113-302

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 902.

ROY STONE, PLAINTIFF IN ERROR,

vs.

ROBERT G. CHISOLM, L. D. MOWRY, A. CANALE, AND SAMUEL LORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED AUGUST 21, 1884.

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INDEX.

	Original.	Print.
Caption	1	1
Complaint	3	1
Summons	9	4
Answer of Alfred Ravenel	11	4
Sallie E. Conner, executrix, &c.	27	10
Chisolm, Mowry, Canale and Lord	30	11
Order amending complaint	37	14
Order discontinuing cause as to Sallie E. Conner, executrix, and A. Ravenel	38	14
Trial of cause	39	15
Certificate of division in opinion	40	15
Judgment	47	18
Order allowing writ of error	48	18
Clerk's certificate	50	19
Assignment of errors	51	19
Writ of error	52	19
Citation	53	20

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit, to wit:

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, A. D. 1884, before the Honorable Hugh L. Bond and the Honorable George S. Bryan, judges of the said United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

ROY STONE, a Citizen of the State of New York, Plaintiff,
against
ROBERT G. CHISHOLM, SAMUEL LORD, A. CANALE, S. D. MOWRY, ALFRED RAVENEL, and SALLIE E. CONNER, as Executrix of James Conner, deceased, Citizens of the State of Sonth Carolina, Defendants.

2 Be it remembered that heretofore, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hundred eighty-three, the said plaintiff came into court and filed the following complaint, which complaint is in the words and tenor following——

Complaint.

THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court.

ROY STONE, a Citizen of the State of New York, Plaintiff,
against
ROBERT G. CHISHOLM, SAMUEL LORD, A. CANALE, L. D. MOWRY, ALFRED RAVENEL, and SALLIE E. CONNER, as Executrix of James Conner, deceased, Citizens of the State of South Carolina, Defendants.

The plaintiff above named, complaining of the defendants, alleges—

I. That the plaintiff, Roy Stone, is a citizen of the State of New York.

3 II. That the defendants, Rob't G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred Ravenel, and Sallie E. Conner, as executrix of James Conner, deceased, are citizens of the State of South Carolina.

II. That heretofore, to wit, on the — February, 1881, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina was a corporation under the laws of the State of South Carolina, with a paid-up capital stock of fifty thousand dollars, and no more; that said company was, by the terms of the *terms of the* charter, authorized to increase its capital stock, in the manner provided by law, to an amount not exceeding two hundred and fifty thousand dollars, and by an act amendatory of its charter, passed

21 December, 1882, the said company was further authorized to increase its capital stock to an amount not exceeding four hundred thousand dollars in the whole, inclusive of the stock then existing. That the company did, from time to time, between the said February, 1881, and 21 March, 1883, increase its capital stock to the sum of three hundred thousand dollars, that is to say, scrip for shares
4 of capital stock to the par value of three hundred thousand dollars were issued; but, as the plaintiff is informed and believes, and so alleges and charges, of the additional amount of stock issued after February, 1881, only the sum of twenty-five thousand dollars, or thereabout, was ever actually paid in, making the entire aggregate of capital actually paid in not to exceed in all the sum of seventy-five thousand dollars.

IV. That by an act amendatory of its charter, passed 21st December, 1882, the name of said Marine and River Mining and Manufacturing Company was changed to the Marine and River Phosphate Company.

V. That on the 21st day of March, 1883, the said Robert G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred Ravenel, and James Conner were directors of said company.

That thereafter, to wit, July, 1883, the said James Conner departed this life, leaving a last will, whereof he appointed his wife, Sallie E. Conner, executrix, who has duly qualified therein.

VI. That on said 21st March, 1883, the said Marine and River Phosphate Company was indebted in an amount not less in
5 the aggregate than seventy-five thousand dollars.

VII. That on said 21 March, 1883, in the administration of the aforesaid directors, there were issued the following bonds, leaving a debt contracted by the said company additional to the debt existing as aforesaid, to wit, sixty bonds or obligations of said company, bearing date the twenty-first day of March, 1883, and each conditioned for the payment to bearer of the sum of five hundred dollars on the 1st day of Jan'y, 1893, with interest thereon, payable semi-annually, at the rate of seven per cent per annum, on presentment of the interest coupons therefor, attached to said bonds, and payable on the first day of July and January of each year.

That an interest coupon for the sum of $17.50 became due on each of said bonds on 1st July last past, and the same were, at maturity, duly presented for payment and payment refused, and no part of the same has been paid.

VIII. That the plaintiff is the lawful owner and holder of said bonds and coupons.

6 IX. That the said bonds, so conditioned, for the aggregate sum of thirty thousand dollars, was in addition to the debt already existing as aforesaid, and constituted an indebtedness in excess of the capital stock of said company actually paid in as aforesaid.

X. That by the 1376th section of the General Statutes of the State of South Carolina, whenever any indebtedness shall be contracted by any corporation in excess of the amount of its capital stock

actually paid in, the directors in whose administration the said indebtedness was contracted are personally liable for the same.

XI. That the said Marine and River Phosphate Company is totally insolvent; that all its property is mortgaged to an extent far in excess of its value; that, as plaintiff is advised, its property, consisting of personalty so mortgaged, is not subject to levy under executers; and that, even if it were, plaintiff alleges and charges that there is no unencumbered property of said company subject to levy, and that judgment and execution would be wholly nugatory and fruitless to effect anything, as the unencumbered property,
7 upon a sale thereof, would not bring sufficient to discharge the liens on same, and the execution creditor would be cast in the cost of such levy and sale.

XII. That by reason of the premises defendants are indebted to plaintiff, upon the coupons held by him as aforesaid, in the sum of one thousand and fifty dollars, and interest from the 1st July, 1883. Wherefore plaintiff prays judgment against said defendant- for the sum of one thousand and fifty dollars, with interest from 1st July, 1883, and costs.

MITCHELL & SMITH,
Pl'ff's Att'ys.

STATE OF SOUTH CAROLINA, *Charleston County:*

Personally appeared before me Henry A. M. Smith, and made oath that he is one of the attorneys for the plaintiff herein, and that the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

8 Deponent further says that the reason why this verification is not made by plaintiff himself is that plaintiff is not a resident of or now within the limits of the county of Charleston and State of South Carolina, which is the county and State wherein deponent and his copartner, attorneys for plaintiff, resides, and that deponent's knowledge and information is derived from the possession of the bonds & coupons mentioned in the complaint, and from declarations of the plaintiff and of the agent of the Marine & River Phosphate Company.

HENRY A. M. SMITH.

Sworn to before me, this 12th day of December, A. D. 1883.
[L. S.] B. H. RUTLEDGE, JR.,
Not. Pub.

And the twelfth day of December, 1883, came into court the plaintiff, by his attorneys, Messrs. Mitchell & Smith, and obtained the following summons, which summons is in the words and tenor following:

9 *Summons.*

THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit.

ROY STONE, a Citizen of the State of New York, Plaintiff,
against
ROBERT G. CHISHOLM, SAMUEL LORD, A. CANALE, L. D. MOWRY, ALFRED RAVENEL, and SALLIE E. CONNER, as Executrix of James Conner, deceased, Citizens of the State of South Carolina, Defendants.

Summons for money demand.

To Robert G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred Ravenel, and Sallie E. Conner, as executrix of James Conner, deceased, defendants in this action:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you,
10 and to serve a copy of your answer on the subscribers at their office, No. 31 Broad street, Charleston, S. C., on or before the rule day, occurring twenty days next after the service of this summons on you, exclusive of the day of service.

If you fail to answer this complaint within the time aforesaid the plaintiff will take judgment against you for the sum of one thousand & fifty dollars, with interest at the rate of seven per cent. per annum from the first day of July, one thousand eight hundred and eighty-three, and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, at Charleston, the twelfth day of December, anno Domini one thousand eight hundred and eighty-three, and in the 108th year of the Sovereignty and Independence of the United States of America.

MITCHELL & SMITH,
Plaintiff's Attorneys.

[L. S.] J. E. HAGOOD,
D'p'ty C. C. C. U. S., Dist. S. C.

Acceptance of Service.

11 We accept service for R. G. Chisolm, Samuel Lord, A. Canale, & L. D. Mowry.

Dec. 12, 1883. LORD & HYDE.

We accept service for Mr. Alfred F. Ravenel and for Mrs. Sallie E. Conner, ex't'x, (Mr. Langdon Cheves being our associate in the latter interest).

SIMONTON & BARKER.

Dec'r 12, 1883. L. CHEVES.

And on the seventh day of January, A. D. 1884, came into court the defendant, Alfred F. Ravenel, by his attorneys, Messrs. Simonton & Barker, and filed the following answer, which answer is in the words and tenor following:

Answer.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

ROY STONE, Plaintiff,
vs.
ROBERT G. CHISHOLM, SAMUEL LORD, A. CANALE, L. D. MOWRY, ALFRED F. RAVENEL, and SALLIE E. CONNER, Executrix of James Conner, deceased, Defendants.

Answer of Alfred Ravenel, defendant.

The defendant, Alfred F. Ravenel, answering the complaint, says:

1. That he has no knowledge or information sufficient to form a belief as to the allegation in the first paragraph of the complaint that Roy Stone is a citizen of the State of New York.

2. He admits that the defendants named in the second paragraph of the complaint are citizens of the State of South Carolina.

3. He admits that the Marine and River Phosphate Mining and Manufacturing Company of South Carolina, on the — day of February, 1881, was a corporation under the laws of the State of South Carolina, with a paid-up capital stock of fifty thousand dollars, and no more; that said company was, by the terms of its charter, authorized to increase its capital stock, in the manner provided by law, to an
13 amount not exceeding two hundred and fifty thousand dollars, and by an act amendatory of its charter, passed 21 December, 1882, the said company was further authorized to increase its capital stock to an amount not exceeding four hundred thousand dollars in the whole, inclusive of the stock then existing. That the company did, from time to time, between said — day of February, 1881, and 21 March, 1883, increase its capital stock, and that it authorized its capital stock to be increased to the sum of three hundred thousand dollars, but defendant denies that it did actually increase its capital stock to more than the sum of two hundred and seventy-seven thousand and five hundred dollars. Defendant denies that scrip for shares of the par value of three hundred thousand dollars were issued. Defendant also denies that of the additional amount of stock issued after February, 1881, only the sum of twenty five thousand dollars, or thereabouts, was actually paid in. Defendant also denies that the entire aggregate of capital paid in did
14 not exceed the sum of seventy-five thousand dollars.

4. Defendant admits that by an act amendatory of its charter, passed 21 December, 1882, the name of said company was changed to the Marine and River Phosphate Company.

5. Defendant admits that on the 21 day of March, 1883, the said Robert G. Chislom, Samuel Lord, A. Canale, L. D. Mowry, this defendant, and James Conner, were directors of said company, and that thereafter James Conner departed this life, to wit, in June, 1883, leaving a last will, whereof he appointed his wife, Sallie E. Conner, executrix, who has duly qualified.

6. Defendant admits that on said 21 March, 1883, the said Marine

and River Phosphate Company was indebted in an amount not less in the aggregate than seventy-five thousand dollars.

7. Defendant admits that in the year 1883 there were issued the following bonds, to wit, sixty bonds or obligations of said company, bearing date the 21 March, 1883, and each conditioned for the payment to bearer of the sum of five hundred dollars on the first day of February, 1893, with interest thereon, payable semi-annually, at the
15 rate of seven per cent. per annum, on presentation of the interest coupons therefor, attached to said bonds, payable on the first day of July and January of each year. That an interest coupon for the sum of seventeen $\frac{50}{100}$ dollars became due on each of said bonds on the first day of July last past, and the same was, at maturity, duly presented and payment refused, and that no part thereof has been paid. Defendant admits that said bonds were evidence of a debt of said company additional to the amount of seventy-five thousand dollars existing at the date when the debt for which they were issued was contracted, but defendant denies that such debt was contracted at date of the bonds, or at the date on which they were issued or delivered, and denies that said bonds were issued on the 21st March, 1883. Defendant also denies that said bonds were issued in the administration of the aforesaid directors. Defendant also denies that said bonds were issued by said directors. Defendant denies that said bonds were a debt of said company additional
16 *additional* to the debt existing on the said 21st day of March, or at the date of their issue. Defendant also denies that said bonds were a debt of said company contracted by said directors, or in their administration of the affairs of the company.

8. Defendant has no knowledge or information sufficient to form a belief as to the allegation of the 8th paragrapn of the complaint, viz., that plaintiff is the lawful owner and holder of said bonds and coupons.

9. Defendant denies that said bonds, so conditioned, for the aggregate sum of thirty thousand dollars, was in addition to the debt already existing on the twenty-first March, 1883, and denies that said bonds constituted an indebtedness in excess of the capital stock of said company actually paid in.

10. Defendant denies that the said Marine and River Phosphate Company is totally insolvent; denies that all its property is mortgaged to an extent far in excess of its value; denies that its property is mortgaged in excess of its value; denies that its property,
17 consisting of personalty so mortgaged, is not subject to levy under execution; denies that there is no unencumbered property subject to levy; denies that judgment and execution would be wholly nugatory and fruitless to effect anything; denies that the encumbered property, upon a sale thereof, would not bring sufficient to discharge the liens on the same, and denies that the execution creditors would be cast in the cost of such levy and sale.

11. And for a further defence defendant says that he is informed, and believes it to be true, that at some time in or about the year 1881 it was found by the company to be necessary, for the purposes of its organization, that dredges, machinery, and other appliances

capable of mining phosphate rock in deep water, and of raising the same, should be purchased; that one F. H. Gordon agreed to purchase from one Roy Stone, who, as defendant is informed, and believes, is the plaintiff, the exclusive right to make, sell, and use, for the sole purpose of phosphate mining, and for no other purposes, in the State of South Carolina, a certain dredging apparatus,
18 for which letters patent had been granted to the said Roy Stone; that on the fifth day of February, 1880, the said F. H. Gordon offered to transfer and assign all his right in said Roy Stone apparatus for dredging phosphate rock to the said company on the following terms, to wit: Bonds of the Marine and River Company for fifty thousand (50,000) dollars, and paid-up stock of the company for one hundred and fifty thousand (150,000) dollars, the company to open books of subscription for thirty thousand (30,000) dollars, the amount so received to be expended in purchase of dredge, plant, &c., under the direction of the president and directors; that at a meeting of the corporation, held on the 2nd March, 1881, the said offer was submitted to the stockholders, and the following resolutions unanimously adopted:

Resolved, That the offer of F. H. Gordon be accepted, and that, in consideration of the assignment by him to the Marine and River Mining and Manufacturing Company of the patent right for the State of South Carolina of the Roy Stone apparatus for dredg-
19 ing phosphate rock, this company do issue to him, in payment therefor, bonds of this company for $50,000, payable two years from date, and paid-up stock in this company to the amount of $150,000, the said stock and bonds to be issued by the company and delivered to the said Gordon when the dredging apparatus is accepted by the president and directors of the company as satisfactory.

For the purpose of carrying out this agreement the capital stock of the company be increased to $230,000, $150,000 of which shall be issued to F. H. Gordon as paid-up stock, under the above resolutions; that this resolution to increase the capital stock shall not go into effect until the dredge is accepted by the president and directors as satisfactory.

4th. That books of subscription shall be open at such time or times and at such place as the president and directors shall prescribe, and $30,000 of the stock so subscribed, or so much thereof as may be necessary, shall be expended for the purchase of the dredge, plant, and appliances, under the direction of the president and directors of the company.

20 That at a meeting of the stockholders held on the 8th October, 1881, the following preamble and resolutions were adopted:

Whereas it was deemed advisable by the president and directors of the company not to provide the bonds for the construction of the dredge, and not to issue the $30,000 of stock appropriated therefor until the dredge was completed and accepted, and thereupon other parties have undertaken to construct the dredge, plant, and appliances;

And whereas the cost has exceeded the original cost of $30,000, and will probably amount to $60,000—

Resolved, 1st, That the capital stock of this company be increased to $250,000, instead of $230,000, as provided for in resolutions adopted on the 2nd March, 1881.

Resolved, 2nd, That on the acceptance of the dredge, plant, and appliance as satisfactory by the president and directors of this company, this company will pay to the owners of the same the cost thereof, as ascertained and approved by the president and directors of the company, by issuing to said owners stock of this com-
21 pany at its full par value to an amount not exceeding $50,000, and paying cash for any amount in excess of the $50,000; said cash, with interest at seven per cent. per annum, to be paid from the first earnings of the company after it resumes mining operations.

That on the 27th December, 1882, the said F. H. Gordon signified to the president of the company his readiness to transfer his Roy Stone dredge and other machinery, and asked its acceptance. That at a meeting of stockholders held on the 30th Dec'r, 1882, a letter from the said Gordon was submitted proposing to turn over to the company the patents and all property used in the mining operations on the Stone river upon the following terms, viz: The company to issue to him at once, or to the persons holding his orders for the same, the $150,000 of stock provided for by the resolutions of 8th Oct., 1881. For his construction account he offered to receive, instead of cash to which he was entitled under the resolutions of 8th Oct., 1881, seven per cent. bonds of the company, maturing in ten years.

22 That said proposition was referred to a special committee, who, at an adjourned meeting of the stockholders, held on the 15th January, 1883, reported that the plant offered by Mr. Gordon, consisting of the tube, the grapplers, & the patent rights connected with them, lighters, scows, & flats, with the engines and other machinery, & including also a steam launch & a wharf & well, were of great value and indispensable to the company, & recommended the acceptance of the offer of said Gordon. That said report was unanimously adopted, & the board of directors instructed to carry out said contract.

That soon afterwards the said plant, patent rights, & property of every description referred to in said report was conveyed, assigned, and delivered to said company, and stock to the amount of $150,000 was issued to the said Gordon, and stock to the amount of $50,000 was issued to the owners of the Roy Stone dredge; all which said stock so issued was declared by said company, and was taken by said vendors, as full paid stock.

23 That plaintiff, Roy Stone, had notice of said contract so made by said F. H. Gordon with said company; that on the same day, viz., on the 15 January, 1883, on which the proposal of said F. H. Gordon was so accepted by said company, said F. H. Gordon delivered to Sam'l Lord, Jr., an order, in terms as follows:

CHARLESTON, So. CA., *Jan'y* 15, 1883.

ROB'T G. CHISOLM, Esq.,
Pres't Marine & River Phosphate Co.

DEAR SIR: Deliver to Sam'l Lord, Jr., thirty-two thousand dollars of the seven per cent. bonds, to be issued to me by the Marine & River Phosphate Company on construction account, as adjusted by yourself and myself, to-day.

(Signed) F. H. GORDON.

[Endorsed across face in red ink:] These bonds are for account of Roy Stone. (Signed) F. H. Gordon. Accepted Jan'y 16, 1883. (Signed) R. G. Chisolm, Pres'd't.

APRIL 17TH, 1883.

Received, this day, from Marine and River Phos. Co. the within-named bonds, numbered from one to sixty-four, of $500 each, making thirty-two thousand dollars ($32,000).

(Signed) W. C. MILLER,
For S. LORD, JR.

24 That said Samuel Lord, Jr., was the attorney and agent for the said Roy Stone at said date, and under his instructions, and as such agent and attorney, received said order as satisfaction in part by said F. H. Gordon of so much of his payment to said Roy Stone of the purchase-money of said patent. That said order was presented by Samuel Lord, Jr., as agent of said Roy Stone, to R. G. Chisolm, president of the Marine and River Phosyhate Company and accepted by him. That said order was held by said Sam'l Lord, Jr., as agent of said Roy Stone, from the 15th Jan'y, 1883, until the bonds were delivered to him by said R. G. Chisolm.

Defendant further says that he is informed, and believes it to be true, that the said plaintiff, Roy Stone, in advance of the action of the company in raising its capital, and its reorganization under above resolution, agreed with said F. H. Gordon to accept in part payment of the said Roy Stone patent shares of the said additional capital so to be paid in, by transfer of said patent and other property, as paid-up stock; and that on the twentieth day of
25 January, 1883, after such increase of capital and such reorganization, he accepted from said F. H. Gordon the transfer of fourteen hnndred of said paid-up shares to himself.

Defendant further says that subsequently, viz., on the 20 Feb'y, 1883, the defendant purchased from said Roy Stone said fourteen hundred shares of increased capital so paid in, whereby, for the first time, this defendant became a shareholder in said company. And that the defendant thus alone became eligible and qualified as director thereof.

3. For a further defence this defendant says that he was not a director in said company when the contract above set forth was made between F. H. Gordon and the said company.

That he was not such director when the order of 15th January, 1883, of said F. H. Gordon on R. G. Chisolm, president of said com-

pany, in favor of plaintiff's agent, Samuel Lord, Jr., for delivery of the said bonds, was accepted.

That this defendant did not accept the office of director in
26 said company, and act as such, until the eighth day of March, 1883.

That no action of the directors of said company, after this defendant became director, was ever had affecting the issue of said bonds.

SIMONTON & BARKER,
Def't's Att'ys.

THE UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

Alfred F. Ravenel, defendant, above named, being duly sworn, says: That the foregoing answer is true to his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

A. F. RAVENEL.

Sworn before me, at Charleston, this 7th Jan'y, 1884.
[SEAL.] W. HUGER FITZSIMMONS,
Notary Public.

Acceptance of Service.

We acknowledge service of a copy of the within answer, this 7th day of Jan'y, 1884.

MITCHELL & SMITH.

27 And on the 7th Jan'y, 1884, came into court Sallie E. Conner, ex'ix, by her attorneys, Messrs. Simonton & Barker, and filed the following answer, which answer is in the words and tenor following:

Answer.

THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court.

ROY STONE, a Citizen of the State of New York, Plaintiff,
against
ROB'T G. CHISOLM, SAMUEL LORD, A. CANALE, L. D. MOWRY, ALFRED RAVENEL, and SALLIE E. CONNER, as Executrix of James Conner, dec'd, Citizens of the State of South Carolina, Defendants.

Answer of Sallie E. Conner, Ex'ix.

Sallie E. Conner, as executrix of the last will and testament of James Conner, deceased, one of the defendants above named, answering the complaint herein:

I. Admits that the allegations contained in paragraph II
28 of said complaint are true, and further admits that James Conner departed this life on the 26th June, 1883, leaving a last will and testament, whereof he appointed this defendant executrix, who has duly qualified thereon.

II. And defendant alleges that she has no knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said complaint contained.

III. And for further defence defendant alleges: That the said James Conner was on the 21st day of March, 1883, in said complaint mentioned, and for a long time previous thereto, absent from the city of Charleston and very ill, and so remained until he departed this life on the 26th day of June, 1883.

SIMONTON & BARKER,
Defendant's Attorneys.

STATE OF SOUTH CAROLINA, } *ss:*
County of Charleston, }

Personally appeared, Sallie E. Conner, who, being duly sworn, says: That she is, as executrix of the will of James Conner, deceased, one of the defendants in the above-entitled action, and that
29 the foregoing answer is true to her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

SALLIE E. CONNER.

Sworn to and subscribed before me, this seventh day of January, anno Dom. 1884.

LANGDON CHEVES,
Notary Public.

Acceptance of Service.

We accept service of a copy of the within answer, this 7th day of Jan'y, 1884.

MITCHELL & SMITH.

And on the 28th day of January, 1884, came into court the defendants, R. G. Chisolm, L. D. Mowry, A. Canale, and Samuel Lord, by their attorneys, Messrs. Simonton & Barker, and filed the following answer, which answer is in the words and tenor following:

Answer.

30 THE UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit.

ROY STONE
against
ROBERT G. CHISOLM, L. D. MOWRY, A. CANALE, SAM'L LORD, ALFRED RAVENEL, and SALLIE E. CONNER, Executrix of James Conner.

Answer of Robert G. Chisolm, L. D. Mowry, A. Canale, and Samuel Lord.

The defendants, Robert G. Chisholm, L. D. Mowry, A. Canale, and Samuel Lord, answering the complaint herein, say:

I. They admit the allegations of paragraphs one and two of the complaint.

II. They deny so much of paragraph three as alleges that rip for shares of capital stock to the par value of three hundred thousand dollars were issued; and they also deny the allegation that of the additional amount of stock issued after February, 1881, only the sum of twenty-five thousand dollars, or thereabouts, was actually paid in.

III. They deny that the bonds referred to in the seventh paragraph of the complaint were a debt contracted by said company
31 during the administration of these defendants, and they deny that said bonds were a debt additional to the debt of said company existing previous to the issue of said bonds.

IV. They deny each and every allegation of paragraph nine of the complaint.

V. Further answering the said complaint these defendants say: That the Marine and River Phosphate Company are a body corporate, organized under the laws of the State of South Carolina, for the purpóse of digging, mining, and removing phosphate rocks and phosphatic deposits from the navigable waters and streams of the State, under a grant made to certain persons therein named by an act approved March 15th, 1870.

VI. That the capital stock of said company was fixed and limited by the articles of association at five hundred thousand dollars ($500,000), of which two hundred and fifty thousand dollars ($250,000) was actually paid up in cash. That by its charter the said corporation was authorized to take, hold, and convey such real and personal property as was necessary for the purpose of
32 its organization. That its capital stock was reduced to fifty thousand dollars under the provisions of an act approved December 24th, 1878, and was subsequently increased to three hundred thousand ($300,000) under the provisions of the said act, and a subsequent act approved December 21st, 1882. That of the said capital stock twenty-seven thousand four hundred and eighty-six shares, of the par value of ten dollars ($10) each, have been issued. That of said shares seven thousand five hundred (7,500) have been actually paid up in cash and twenty thousand shares in property purchased by the company at the time the certificates of stock therefor were issued.

That the facts connected with the issue of the said twenty thousand shares were these: That by two several contracts made and entered into, respectively, on the 2nd of March and the 8th of October, 1881, between one F. H. Gordon and certain other persons, of the one part, and the Marine and River Phosphate Company, of the other part, the said company agreed to purchase from the said F. H. Gordon
33 and his associates certain dredges, the Roy Stone patent, and other patent rights and property, and, as and for the consideration and purchase-money for the same, to issue to the said F. H. Gordon and other owners of the said property twenty thousand share- of paid-up stock of the company and fifty thousand dollars ($50,000) of six per cent. bonds, and to pay to the said parties, in cash, out of the earnings of the company, any amount, in excess of fifty thousand dollars, which said parties of the first part might expend in the construction of dredges and other plant, if the same should be

accepted by the said company as satisfactory; that on or about the 26th January, 1883, the said plant was tendered to the said company by the said Gordon, who, at the time of making said tender, offered to receive seven per cent. bonds of the company in lieu of the cash for his construction account, to which he was entitled under his contract with the said company; that by a resolution adopted at a meeting of the stockholders of the said company on the said 26th January, 1883, the said plant, the Roy Stone patent right, and
34 other patent rights and property were accepted by the said company, and the issuing of the said bonds for the construction account of said Gordon was authorized and directed; that upon the conveyance, transfer, and delivery of the said plant, patent rights, and other property to the company certificates for the said twenty thousand shares of said capital stock were issued to the owners of the said plant, patent rights, and other property, in part payment for the same; that the said shares were issued by the said company and accepted by the owners of the said property as full paid-up stock, and are so entered upon the records and books of the company.

VII. That at a meeting of the said corporation held on the 7th March, 1883, the persons named in paragraph V of the complaint were elected and became directors of the said corporation, and, with the exception of James Conner, one of the parties therein named, who died in June of that year, continued to act as such directors until the 17th day of September, 1883.

VIII. That on the 17th day of April, 1883, the Marine and River Phosphate Company had in its possession the seven per
35 cent. coupon bonds to which the said F. H. Gordon was entitled under the contract, more particularly set forth in paragraph VI of this answer.

That on the day last mentioned the said Roy Stone presented to the president of said company an order, dated January 15th, 1883, signed by the said F. H. Gordon, and directing him, the said president, to issue thirty-two thousand dollars ($32,000), parcel of the said bonds, to the plaintiff, and that the president of the company thereupon delivered to the plaintiff the bonds mentioned in the complaint, being the bonds numbered one to sixty-four, inclusive.

IX. These defendants admit that the said company is temporarily embarrassed, but deny that it is totally insolvent; and they also deny that its property is mortgaged to an amount far in excess of its value.

X. These defendants deny the allegations contained in the paragraph XII of the complaint.

And, having fully answered the said complaint, they pray to be hence dismissed, with their costs.

SIMONTON & BARKER,
Def'ts' Att'ys.

36 STATE OF SOUTH CAROLINA, *Charleston County:*

Personally appeared Rob't G. Chisolm, L. D. Mowry, A. Canale,

and Samuel Lord, who, being severally sworn, each for himself says: That the foregoing answer is true of his own knowledge, except as stated on information and belief, and in so far as it is so stated, he believes it to be true.

R. G. CHISOLM.
L. D. MOWRY.
A. CANALE.
S. LORD, JR.

Sworn to before me, this 5th day of January, 1884.
SIMEON HYDE, JR.,
Notary Public.

Acceptance of Service.

Service accepted, Jan'y 7th, 1884.
MITCHELL & SMITH.

And on the 10th day of April, 1884, came into court the plaintiff, Ray Stone, by his attorneys, Messrs. Mitchell & Smith, and obtained the following order to amend complaint, which order is in the
37 words and tenor following:

Order.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit.

ROY STONE, Plaintiff,
against
ROBERT G. CHISOLM, L. D. MOWRY, A. CANALE, SAMUEL LORD, ALFRED RAVENEL, and SALLIE E. CONNER, Exe'x, Defendants.

Order to amend complaint.

On hearing the motion to amend the complaint made on the call of the docket, and on motion of Mitchell & Smith, for plaintiff—

Ordered, That the tenth article of the complaint be amended so as to read as follows, viz:

"X. That by the 1367th section of the General Statutes of the State of South Carolina, and by the provisions of an act of the said State, approved 10th December, 1869, entitled 'An
38 act to regulate the formation of corporations,' (under which act the said Marine and River Phosphate Mining and Manufacturing Company of South Carolina was incorporated), and by sundry other laws of said State, the said defendants are jointly and severally liable to the plaintiff for the payment of the said bonds and coupons."

Ap'l 10th, 1884. HUGH L. BOND, *C't Judge.*

And on the 16th day of April, 1884, came into court the plaintiff, Roy Stone, by his attorneys, Messrs. Mitchell & Smith, and obtained the following order for leave to discontinue, which order is in the words and tenor following:

Order.

UNITED STATES OF AMERICA, *District of South Carolina:*

In the Circuit Court, Fourth Circuit.

ROY STONE, Plaintiff,
39 *against*
ROBERT G. CHISOLM *et al.*, Defendants.

Order for leave to discontinue.

This case having been called for trial, on motion of plaintiff's attorneys—

Ordered, That the plaintiff have leave to discontinue as to Sallie E. Conner, executrix, & Alfred F. Ravenel, two of defendants, on payment of costs.

Ap'l 16, 1884. HUGH L. BOND, *C't Judge.*

Trial of Cause.

ROY STONE, Plaintiff,
against
ROBERT G. CHISOLM, SAMUEL LORD, A. CANALE, & L. D. MOWRY.

And at the April term, 1884, of the said circuit court, this cause came up for hearing before the Honorable Hugh L. Bond, circuit judge, and the Honorable George S. Bryan, district judge, when the following jury, was empaneled, organized and sworn: J.
40 A. Blatchford, foreman; J. A. Smith, W. M. Graham, S. W. Williams, W. H. Bloeker, J. D. Wiggins, J. R. Childers, Jr., B. Stokes, A. B. Byrd, J. C. Dunbar, H. D. Shaw, and J. M. Hair.

The complaint was read by Messrs. Mitchell & Smith, plaintiff's attorneys; and thereupon Messrs. Simonton and Barker, for the defendants, demurred orally, and moved that complaint be dismissed; after hearing the argument of counsel for plaintiff and defendants; the opinion of the judges aforesaid upon the question being opposed, a certificate of division was ordered, which certificate of division is in the words and tenor following:

Certificate of Division of Opinion.

In the Circuit Court of the United States for the District of South Carolina, Charleston. April Term, 1884.

Present: Hugh L. Bond, circuit judge; George S. Bryan, district judge.

41 ROY STONE, Plaintiff,
vs.
ROBERT G. CHISOLM, L. D. MOWRY, A. CANALE, and SAMUEL LORD, Defendants.

The above cause having come on to be tried before the court (the

Hon. Hugh L. Bond, circuit judge, and the Hon. George S. Bryan, district judge, being present) on the 16th day of April, 1884, and a jury having been duly panelled to try the same, and the plaintiff having read his complaint, the allegations whereof are as follows:

"I. That the plaintiff, Roy Stone, is a citizen of the State of New York.

"II. That the defendants, Rob't G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred Ravenel, and Sallie E. Conner, as executrix of James Conner, deceased, are citizens of the State of South Carolina.

"III. That heretofore, to wit, on the — February, 1881, the Marine and River Phosphate Mining and Manufacturing Company of South Carolina was a corporation under the laws of the State of South Carolina, with a paid-up capital stock of fifty thousand dol-
42 lars, and no more; that said company was, by the terms of the charter, authorized to increase its capital stock, in the manner provided by law, to an amount not exceeding two hundred and fifty thousand dollars, and by an act amendatory of its charter, passed — December, 1882, the said company was further authorized to increase its capital stock to an amount not exceeding four hundred thousand dollars in the whole, inclusive of the stock then existing; that the company did, from time to time, between the said February, 1881, and 21st March, 1883, increase its capital stock to the sum of three hundred thousand dollars, that is to say, scrip for shares of capital stock to the par value of three hundred thousand dollars were issued; but, as the plaintiff is informed and believes, and so alleges and charges, of the additional amount of stock issued after — February, 1881, only the sum of twenty-five thousand dollars, or thereabouts, was ever actually paid in, making the entire aggregate of capital stock actually paid in not to exceed in all the sum of seventy-five thousand dollars.

43 "IV. That by an act amendatory of its charter, passed 21st December, 1882, the name of said Marine and River Phosphate Mining and Manufacturing [Company] was changed to the Marine and River Phosphate Company.

"V. That on the 21st day of March, 1883, the said Robert G. Chisolm, Samuel Lord, A. Canale, L. D. Mowry, Alfred Ravenel, and James Conner were directors of said company. That thereafter, to wit, July, 1883, the said James Conner departed this life, leaving a last will, whereof he appointed his wife, Sallie E. Conner, executrix, who has duly qualified thereon.

"VI. That on said 21st March, 1883, the said Marine and River Phosphate Company was indebted in an amount not less in the aggregate than seventy-five thousand dollars.

"VII. That on said 21st March, 1883, in the administration of the aforesaid directors, there were issued the following bonds, being a debt contracted by the said company additional to the debt existing as aforesaid, to wit:

44 "Sixty bonds or obligations of said company, bearing date the twenty-first day of March, 1883, and each conditioned for

the payment to bearer of the sum of five hundred dollars on the first day of January, 1893, with interest thereon, payable semi-annually, at the rate of seven per cent. per annum on the presentment of the interest coupons therefor, attached to said bonds, and payable on the first days of July and January of each year. That an interest coupon for the sum of $17.50 became due on each of said bonds on the first day of July last past, and the same were, at maturity, duly presented for payment and payment refused, and no part of the same has been paid.

"VIII. That plaintiff is the lawful owner and holder of said bonds and coupons.

"IX. That the said bonds, so conditioned, for the aggregate sum of thirty thousand dollars, was in addition to the debt already existing as aforesaid, and constituted an indebtedness in excess of the capital stock of said company actually paid in as aforesaid.

"X. That by the 1367th section of the General Statutes of
45 the State of South Carolina, and by the provisions of an act of the said State, approved 10th December, 1869, entitled 'An act to regulate the formation of corporations,' (under which act the said Marine and River Phospate Mining and Manufacturing Company of South Carolina was incorporated), and by sundry other laws of said State, the said defendants are jointly and severally liable to the plaintiff for the payment of the said bonds and coupons.

"XI. That the said Marine and River Phosphate Company is totally insolvent; that all its property is mortgaged to an extent far in excess of its value; that, as plaintiff is advised, its property, consisting of personalty so mortgaged, is not subject to levy under execution; and that, even if it were, plaintiff alleges and charges that there is no unencumbered property of said company subject to levy, and that judgment and execution would be wholly nugatory and fruitless to effect anything, as the encumbered property, upon a sale thereof, would not bring sufficient to discharge the liens on the same, and the execution creditors would only be cast in the
46 costs of such levy and sale.

"XII. That by reason of the premises defendants are indebted to plaintiff, upon the coupons held by him as aforesaid, in the sum of one thousand and fifty dollars, and interest from the 1st day of July, 1883.

"Wherefore plaintiff prays judgment against said defendants for the sum of one thousand and fifty dollars, with interest from 1st July, 1883, and costs."

Thereupon the defendants demurred orally, on the ground—

"That the liability imposed by the statutes referred to in the complaint cannot be enforced in an action at law, but by a proceeding in equity only, and, consequently, that this being a court of law, has no jurisdiction to entertain the plaintiff's case."

And this question having been fully argued before the judges aforesaid, and their opinions thereupon being opposed, the point upon which they disagree is hereby stated during the same term as follows:

47 "Whether the liability imposed upon the directors of a corporation by the provisions of the statutes refered to in the complaint can be enforced by a single aggrieved creditor in an action at law against one or more of the directors, or whether such creditor must proceed by a creditor's bill in equity."

Consequently, the said judges hereby state the said questions and certify the same, and direct that the certificates hereof be entered of record.

HUGH L. BOND, [SEAL.]
U. S Circuit Judge, 4th Circuit.
GEO. S. BRYAN,
U. S. District Judge for So. Ca.

Pursuant to the requirement of section 650 of the Revised Statutes of the United States, the presiding judge states that he is of opinion as follows: That the liabilities imposed upon the directors of a corporation, by the provisions of the statutes refer-ed to in the complaint, cannot be enforced in an action at law, but by a
48 proceeding in equity only, and, consequently, that this being a court of law, has no jurisdiction to entertain the plaintiff's case.

Therefore, be it adjudged that the complaint be dismissed.

Ap'l 19th, 1884. HUGH L. BOND, *C't Judge.*

And on the 19th day of April, 1884, came into court the plaintiff, by his attorneys, Messrs. Mitchell & Smith, and obtained the following order allowing writ of error, which order is in the words and tenor following:

Order.

UNITED STATES OF AMERICA, *Dstrict of South Carolina:*

In the Circuit Court, Fourth Circuit. April Term, 1884.

ROY STONE, Plaintiff,
against
ROBERT G. CHISOLM, SAMUEL LORD, A. CANALE, L. D. MOWRY, ALFRED RAVENEL, and SALLIE E. CONNER, Executrix, Defendants.

Order allowing writ of error.

49 And now comes the plaintiff above named, Roy Stone, by his attorneys, in open court, at the term aforesaid, and prays that a writ of error do issue to the said court to the Supreme Court of the United States from the judgment of the said court dismissing the plaintiff's complaint in the above cause upon the certificate of division of the judges of said court thereupon. And it is so ordered.

Ap'l 19, 1884. HUGH L. BOND, *C't Judge.*

And on the 23d day of May, 1884, came into court the plaintiff, Roy Stone, by his attorneys, Messrs. Mitchell & Smith, and filed the following: Assignment of errors, writ of errors, citation and acceptance of service upon the same.

50 *Certificate of Clerk.*

UNITED STATES OF AMERICA, *District of South Carolina:*

In Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records and proceedings had in the case of Roy Stone, plaintiff, against Robert G. Chisolm *et al.*, defendants, which are now on file in this court.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, South Carolina, this the 28th day of June, A. D. 1884.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

51 *Assignment of Errors.*

THE UNITED STATES OF AMERICA, *District of South Carolina,* } *ss:*

To the Honorable the Justices of the Supreme Court of the United States:

And now comes Roy Stone, a citizen of the State of New York, by Mitchell & Smith, his attorneys, and complains that in the records and proceeding and also in the rendition of judgment in an action between the said Roy Stone, plaintiff, and Robert G. Chisholm, L. D. Mowry, A. Canale, and Samuel Lord, citizens of the State of South Carolina, defendants, tried in the circuit court of the United States for the district of South Carolina, at the April term thereof, 1884, and in which judgment was rendered against him on the 19th day of April, 1884, manifest error hath intervened, to the great damage of the said Roy Stone, in that the said circuit court hath adjudged that the liability imposed upon the defendants by the provisions of the statutes referred to in the complaint could not be enforced by the plaintiff in an action at law against the defendants aforesaid, but the plaintiff must proceed by a creditor's bill in equity, and hath ordered plaintiff's complaint dismissed.

Wherefore plaintiff prays for the allowance of a writ of error and that the judgment aforesaid be reversed.

MITCHELL & SMITH,
Attorneys for Roy Stone, Plaintiff in Error.

Service of the foregoing assignment of errors acknowledged, this 23d May, 1884.

SIMONTON & BARKER,
For all Defendants.

52 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of of the circuit court of the United States for the district of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court before you, between Roy Stone, a citizen of the State of New York, plaintiff in error, and Robert G. Chisolm, L. D. Mowry, A. Canale, and Samuel Lord, citizens of the State of South Carolina, defendants in error, a manifest orror hath happened, to the great damage of the said Roy Stone, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seals, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the third Monday of June next, 1884, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-second day of May, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Service of the foregoing writ of error acknowledged, this 23d May, 1884.

SIMONTON & BARKER,
For all Defendants.

53 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Robert G. Chisolm, L. D. Mowry, A. Canale, and Samuel Lord, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, 1884, pursuant to a writ of error filed in the clerk's office of the circuit court for the district of South Carolina, wherein Roy Stone is plaintiff in error and Robert G. Chisolm, L. D. Mowry, A. Canale, and Samuel Lord are defendants in error, to show cause, if any there be, why the plaintiff judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the defendants parties in that behalf.

Witness the Honorable George S. Bryan, judge of the district court of the United States for the district of South Carolina, this 23rd day of May, in the year of our Lord one thousand eight hundred and eighty-four.

23d May, 1884.

GEO. S. BRYAN,
U. S. Judge, D. of S. Ca.

Service acknowledged of the foregoing citation, this 23d May, 1884.

SIMONTON & BARKER,
For all Defendants.

[Endorsed:] Filed 23 May, 1884. J. E. Hagood, C. C. C. U. S., dist. S. C.

Endorsed on cover: South Carolina C. C. U. S. No. 902. Roy Stone, plaintiff in error, *vs.* Robert G. Chisolm, L. D. Mowry, A. Canale, and Samuel Lord. Filed 21st August, 1884.

113-302

Office Supreme Court U. S.
FILED.
JAN 2 1885
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 902.

ROY STONE, *Plaintiff in Error,*

vs.

ROBERT G. CHISOLM, L. D. MOWRY, A. CANALE AND SAMUEL LORD, *Defendants in Error.*

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT ON BEHALF OF ROY STONE, PLAINTIFF IN ERROR.

This case comes up on a certificate of division between the Judges of the Circuit Court of South Carolina.

The case and question are fully and succinctly stated in the certificate of division to be found in the printed Transcript between pages 15 and 18 inclusive.

Under the provisions of the Judiciary Act up to June, 1872, upon a division of opinion below, all proceedings were stopped and the question was certified up to this Court, and no further proceedings had in the cause, until the question

was decided above. By the Act of 1st June, 1872, the law was changed; where there is a division below the opinion of the presiding Judge is made to prevail and the case proceeds to *final judgment*, and the appeal is taken from the final judgment as in other cases, but is heard upon the point of division. (*Revised Statutes U. S., Secs. 651, 693 and 697.*)

Under the old rule it was settled by a series of cases that only the certificate was to be brought up, as this Court only passed upon the point raised before final judgment below. Under the new Statute the writ of error being taken as in other cases, the whole record is to be brought up for final judgment.

STATEMENT OF THE CASE.

Roy Stone filed his Complaint against the Defendants in error, alleging—

1. The necessary citizenship.

2. That the Marine and River Phosphate Company was a corporation organized and incorporated under the provisions of an Act of the State of South Carolina, passed 10th December, 1869, entitled "An Act to Regulate the Formation of Corporations." (*Statutes at Large of South Carolina, Vol. XIV, page 295.*)

3. That the entire aggregate of capital stock of such company actually paid in on 21st March, 1883, was $75,000.

4. That on 21st March, 1883, the indebtedness of such company was in the aggregate $75,000.

5. That on 21st March, 1883, the Defendants were directors of the said company.

6. That on 21st March, in the administration of said directors a debt was contracted by said company to Plaintiff

for $30,000, in addition to its debt then existing, and in excess of its capital stock actually paid in.

7. That by the provisions of said Act of 10th December, 1869, and of the 1367th section of the Revised Statutes of South Carolina, the Defendants as directors of the said company were liable to Plaintiff for such debt.

The provisions of the 33d section of the Act of 10th December, 1869, are—

"The whole amount of the debts which any such company at any time owes "shall not exceed the amount of its capital stock actually paid in; and in case "of any excess, the directors under whose administration it occurs shall be "jointly and severally liable to the extent of such excess for all the debts of the "company then existing, and for all that are contracted, so long as they respec- "tively continue in office, and until their debts are reduced to the amount of "the capital stock." (See Act in Appendix hereto.)

In May, 1882, went into force the Revised General Statutes of South Carolina. In Chapter XXXVIII are certain provisions therein expressly made applicable to the charters of all corporations already in existence under any general or special Acts of incorporation. Section 1367 provides as follows:

"The total amount of debts which such corporations shall at any time owe "shall not exceed the amount of its capital stock actually paid in; and in case "of excess, the directors in whose administration it shall happen shall be per- "sonally liable for the same both to the contractor or contractors, and to the "corporation."

The case duly came on to be tried before the Circuit Court at the April Term, 1884; a jury was empanelled and sworn, and the Complaint was read to the jury, when Defendants' counsel interposed no defence, but demurred orally on the ground the Court had no jurisdiction, because—

"The liability imposed by the Statutes referred to in the Complaint cannot "be enforced in an action at law, but by a proceeding in equity only, and con- "sequently that this being a court of law had no jurisdiction to entertain the "Plaintiff's case."

The Court differed in opinion, but the presiding Judge being of opinion with the Defendants, so ruled, and it was accordingly adjudged that Plaintiff's Complaint be dismissed.

The demurrer of the Defendants admits all the facts as alleged in the Complaint. The single question before the Court is: Admitting Plaintiff's rights as incontestible, can he enforce them in a Court of law, or must he file a creditor's bill in equity?

ASSIGNMENT OF ERRORS.

1. That the liability imposed upon the directors being *in solido* as to each for the full amount of the excess, and not a *proportionate* liability, the Court should have held that the Plaintiff was entitled to bring his action against any one or more of the directors for his debt, and have overruled the demurrer.

2. That the Defendants having interposed no defence, but having gone to the jury on the facts alleged in Plaintiff's Complaint, the Court should have directed a verdict for the Plaintiff for the amount claimed.

ARGUMENT.

POINT FIRST.

THAT THE LIABILITY OF THE DIRECTORS CAN BE ENFORCED IN AN ACTION BY A SINGLE CREDITOR AGAINST THEM.

If the case rested exclusively upon the Act of 1869, there could be no room for argument on this point. The 35th section of that Act provides—

"When any of the officers of a company are liable by the provisions of this

"Act to pay the debts of the company, or any part thereof, any person to whom "they are so liable may have an action against any one or more of said officers, "and the declaration in such action shall state the claim against the company "and the grounds on which the Plaintiff expects to charge the Defendants per- "sonally; and such action may be brought notwithstanding the pendency of an "action against the company for the recovery of the same claim or demand, and "both of the actions may be prosecuted until the Plaintiff obtains the payment "of his debt and the cost of both actions."

It is admitted that when the State of South Carolina in 1882 made a general provision in the Revised Statutes applicable to all charters, both general and special, it operated to conform all similar provisions to this general one as well as to interpolate it as a provision in all charters then existing without any such provision. The effect was to substitute this Section 1367 of the Revised Statutes in the place of Section 33 in the charters of all corporations formed under the Act of 1869.

The two sections being the same in substance, it makes no difference which is taken so far as the Plaintiff's case is concerned.

But the Defendants go farther, and claim that because the General Revised Statutes of 1882 did not in terms re-enact the 35th section of the Act of 1869 as applicable to all corporations as well as those already incorporated under the Act of 1869, that omission operated as a repeal of this section in those charters.

This is a complete misapprehension of the Acts. The Act of 1869 provides the means of obtaining a charter for certain limited classes of companies without an application to the Legislature. It prescribes what shall be the provisions of those charters. The Marine and River Phosphate Company was incorporated under this Act. Neither the charter of the company nor the Act of 1869 as applicable to all corporations formed under it, have ever been repealed. The repealing clause of the General Revised Statutes of 1882 is as follows (Part V, Chapter CXIX):

"SEC. 2739. All Acts and parts of Acts the provisions whereof are re-en- "acted in this Act or which are inconsistent with or repugnant to this Act, are "hereby repealed." (See Chapter CXIX in Appendix.)

Nothing contained in the 35th section of the Act of 1869 can in any way be said to be inconsistent with any provision in the General Revised Statutes. (See Chap. XXXVIII in the Appendix.)

Furthermore, Section 1375 of the same Chapter, which contains Section 1367 is—

"Nothing contained in the foregoing sections shall be construed to remove "such liabilities as by law such corporations, their officers and stockholders are "now subject to."

We do not see how any argument can make it clearer that Section 35 of the Act of 1869 still forms a part of the charter of the company, and under that section the creditor has the express and explicit right to proceed against any one or more of the directors directly in an action at law for the debt.

But assuming that only the 1367th section of the Revised General Statutes was before the Court, still, under the rule in this Court and the construction given to similar provisions by the Supreme Court of the State of South Carolina, the action is well brought.

There have been a series of cases in this Court on the question, and the following rules have been established:

1. Where the liability imposed on stockholders or directors is a *proportionate* one, so that they have a right to have the amount of each one's contribution established, then the proceeding to hold them liable is by bill in equity, to which all the stockholders can be made parties.

2. Where the stockholders or directors are liable each *in solido* for an amount in full which can be fixed and established, then any one or more of them can be sued directly by any person entitled on his own behalf.

Pollard vs. Bailey, 20 Wall., 520—October Term, 1874:

Bailey, a creditor of the Central Bank of Alabama, sued

Pollard, a stockholder, at law, under the following provision in the charter:

"Individual stockholders having shares in said bank shall be bound respec-
"tively for all the debts of the bank in proportion to their stock holden there-
"in."

Pollard demurred on the ground that the Plaintiff could only proceed in equity, and this Court on error sustained the demurrer on the ground that

"The provision therefore for a *proportionate liability* is equivalent to a pro-
"vision for an appropriate form of equitable action to enforce it. The case is
"different from what it would be if the charter had provided generally that all
"stockholders should be *individually* liable for the payment of the debts."

Having so decided, the opinion of this Court proceeds to assign as a further ground of equitable jurisdiction that an inspection of the charter as a whole showed a legislative intent that this proportionate liability should not enure to any individual creditor, but was intended to constitute a *fund* to be divided among all creditors *pro rata*, and therefore all creditors entitled to share must be made parties.

The settled doctrine of this as of all Courts has been to hold that the creditor first moving was entitled to a preference as the reward of his diligence. The objection that there is not enough to satisfy all claims applies to individuals as well as corporations, but save in the case of some kind of trust it has never been held that one creditor could not move to obtain his own debt because in so doing he would exclude other and more tardy creditors from obtaining theirs. The aim of Courts has always been to encourage diligence on the part of a creditor to secure himself irrespective of others. The Court say that the intent of the Legislature, as made evident from other sections of the Act in *Pollard vs. Bailey*, was to treat this liability as a fund charged with a *quasi trust* for the benefit of all the creditors.

Terry vs. Tubman, 92 U. S., 156—October Term, 1875:

This was also an action at law under the following clause in the charter:

"That the individual property of the stockholders in said bank shall be "bound for the ultimate redemption of the bills issued by said bank *in propor-* "*tion* to the number of shares held by them respectively."

This Court decided against the Plaintiff on the question of the Statute of Limitations, but in delivering their opinion refer to *Pollard vs. Bailey* as an authority on the point that where a proportionate liability is given against the stockholder, one creditor will not be permitted to recover his debt in a separate action to the exclusion of others similarly situated.

This was clearly *obiter*. The Defendants' plea raised only the question of the Statute of Limitations, and the case was decided by this Court on that point; but in delivering the opinion they point out this as a defect in the original Complaint.

Hornor vs. Henning, 93 U. S., page 228—October Term, 1876:

Here under a provision similar to the one now before the Court, it was held that the proper proceeding was in equity, but on the ground that here also the intent of the Act of Congress relied upon was to make a fund of a *quasi trust* character for the benefit of and to be divided among all the creditors entitled *pro rata;* and further, that from the allegations of the Complaint itself it would appear that there were other creditors entitled.

Mills vs. Scott, 99 U. S., page 25—October Term, 1878:

Scott brought an action at law in the Circuit Court for the Southern District of Georgia against Mills, administrator of Hall, to charge the estate of a deceased stockholder, under the following clause in the charter of the bank:

"The persons and property of the stockholders shall at all times be liable, "pledged and bound for the redemption of bills and notes at any time issued, "*in proportion* to the number of shares that each individual and corporation "may hold and possess."

The Circuit Court, on demurrer, held the action well

brought, and directed judgment for the Plaintiff. On writ of error this Court affirmed the judgment on the ground:

1. That the Supreme Court of the State of Georgia had decided that the proportionate liability of a stockholder under a provision of this kind could be enforced by any creditor entitled in a separate action at law, to the extent of his claim.

2. That although as decided in *Pollard vs. Bailey* and *Terry vs. Tubman*, this liability could also be enforced in an action in equity *concurrently*, yet that an action at law for debt would always lie where the amount sought to be recovered is certain or can be ascertained from fixed data by computation.

It will be seen here that the Court reverts to the true rule, viz: that where the amount sought to be recovered is a fixed or ascertainable sum from the stand-point of the creditor, and not merely a *proportionate* sum, there the action of debt lies, although a Court of Equity has concurrent jurisdiction; but that where the sum to be recovered is a proportionate one, to be assessed upon several, there the proceeding in equity is proper.

Flash vs. Conn, 109 U. S., page 371—October Term, 1883:

An action at law was brought by Flash against Conn as a stockholder. The charter was—

"All the stockholders of every company incorporated under this Act shall be "severally individually liable to the creditors of the company in which they are "stockholders, to an amount equal to the amount of stock held by them respec- "tively, for all debts and contracts made by said company, until the whole "amount of capital stock fixed and limited by such company shall have been "paid in, and a certificate thereof shall have been made and recorded as pre- "scribed in the following section."

On demurrer below the Court overruled the demurrer, and gave judgment for the Plaintiff. On writ of error this Court sustained the judgment below, and say—

"It is objected that the declaration sets out a case which should have been "prosecuted in equity and not at law. There is no ground for this objection "to rest upon. In the case of *Pollard vs. Bailey, 20 Wall., 520*, and *Terry vs.* "*Tubman, 92 U. S., 156*, to which we are referred in its support, the liability "of the stockholders was *in proportion* to the stock held by them. Each stock- "holder was therefore only liable for his *proportion* of his debts. This propor- "tion could only be ascertained upon an account of the debts and stock, and a "*pro rata* distribution of the indebtedness among the several stockholders. "This the Court held could only be done by a suit in equity. But in this case "the Statute makes every stockholder individually liable for the debts of the "company for an amount equal to the amount of his stock. This liability is "fixed, and does not depend on the liability of other stockholders. There is "no necessity for bringing in other stockholders or creditors."

Applying these results to the case before the Court.

So far from there being any legislative intent expressed that this liability imposed by the Act of 1869 should constitute a fund bound for all the creditors *pro rata*, Section 35 expressly and explicitly declares that any creditor entitled may have his separate and independent action at law against any one or more of the directors liable for the debt. Therefore any ground for equitable jurisdiction on this ground as inferred in the cases of *Pollard vs. Bailey*, and *Hornor vs. Henning*, is rebutted.

So far from it being inequitable that one creditor should by his greater diligence get his debt paid before others with the same rights, but more indifferent or tardy in asserting them, this Court in *Freedman's Savings Trust Co. vs. Earle, 110 U. S., page 710* (October Term, 1883), have decided that even on a general creditors' bill in equity, the creditor first filing the bill, whether he simply proceeds for himself or on behalf of others as well, is entitled in case of succcss, as the reward for his diligence, to have his claim first paid out in full.

And the adjudication of the Supreme Court of South Carolina upon the construction of this very Statute is to the same effect.

Sullivan vs. Sullivan Manufacturing Co., 20 S. C., page 79:

In this case Sullivan, who was the holder of a note of the company, brought an action against the company and its

directors to recover the amount due on the note. The action was for his own behalf alone, and the liability of the directors was alleged by reason of their non-compliance with the provisions of Section 16 of the Act of December, 1869, for which failure they are made liable in Section 29.

The Court decided that the liability imposed upon the directors by the terms of the several sections of the Act is *ex contractu* and not *ex delicto* for a penalty. That every creditor of the company has a right as a part of his *contract*, to hold the directors liable in certain contingencies, that this is independent of the company's solvency or insolvency, and that the creditor had a right to proceed directly against the directors upon the original note without obtaining judgment against the company, but that he might, if he saw fit, join the directors in the same action with the company.

If the liability is a part of the contract as decided by the Supreme Court of the State construing its own Statute, and the creditor at once becomes entitled to it as a part of his agreement, and the sum is fixed or ascertainable by computation, where is the objection to the action at law?

The Complaint alleges that on a day certain the capital stock actually paid in amounted to $75,000; that at the same time the indebtedness of the company amounted to $75,000; that at that time an indebtedness to the Plaintiff for $30,000 was contracted, being $30,000 in excess of the capital stock actually paid in and of the indebtedness then existing.

The allegations of the Complaint are the only facts before the Court; there is not a suggestion that there are any other creditors who would be entitled; it is an action to recover a fixed sum on a liability fixed and alleged with mathematical precision, and directly within the terms of the decision in *Flash vs. Conn, supra.*

Lastly on this point. This very Statute of 1869 has been before this Court.

Manufacturing Co. vs. Bradley, 105 U. S., page 175:

A suit was brought by a single creditor of the company

(this very same Marine and River Phosphate Company) on his own behalf alone, against the company and several of its stockholders, to enforce the liability imposed by the 22d section of the Act of 1869. This was a suit in *equity;* but in lieu of insisting that the case was one of equitable jurisdiction, the counsel for the stockholders (among whom was Mr. Samuel Lord, one of the present Defendants in error,) strenuously urged that the jurisdiction in equity could not be sustained, because the complainant had a complete and adequate remedy at law so far as relief was sought against the stockholders individually upon their Statutory liability.

This Court decided that while the jurisdiction of a Court of law was undoubted, yet equity had a *concurrent* jurisdiction, and therefore sustained the bill.

POINT SECOND.

THAT DEFENDANTS HAVING GONE TO THE JURY UPON THE FACTS ALLEGED BY THE PLAINTIFF, THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE AMOUNT CLAIMED.

The Plaintiff served his Complaint. The Defendants filed their answers, raising certain defences on the merits. The cause duly came to issue, was docketed and called for trial at a regular term of the Court. Both sides were ready for trial. A jury was empanelled and sworn for the trial of the cause.

The Plaintiff read his Complaint to the jury; the Defendants then in lieu of reading their answers and going to trial on the merits, interposed an oral demurrer on the question of jurisdiction. In other words, when called on to defend the cause the only defence set up was a question of jurisdiction. No notice whatever had been given of any such question. It had not been raised in any of the answers, no demurrer on that point had been filed, no notice given of any motion to dismiss for want of jurisdiction; but at the last moment, when the jury has already begun to try the

case on the merits, the answers are abandoned and their defence is staked on an objection to the jurisdiction.

It is a familiar principle that a question of jurisdiction can be raised at any time. But the effect of that objection may depend upon the time when it is raised. There is no question that Defendants could raise the point of jurisdiction. But if when called upon to present their defence on the merits to the jury they abandon their defence and rely only on the question of jurisdiction, the effect of an overruling of the demurrer is to leave the case before the jury with all the Plaintiff's facts admitted, and the Court must order a verdict for the Plaintiff.

Otherwise by postponing such a preliminary point until the case goes before the jury, the Defendants would always run the chance of procuring an indefinite postponement until the preliminary point is decided above.

It is submitted, therefore, that if the demurrer be overruled the Court should order judgment for the Plaintiff on his Complaint.

WM. E. EARLE,
Attorney for Plaintiff in Error.

APPENDIX.

AN ACT TO REGULATE THE FORMATION OF CORPORATIONS.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same,* Three or more persons who shall have associated themselves together by articles of agreement, in writing, for the purpose of carrying on any mechanical, mining, quarrying or manufacturing business, and shall have complied with the provisions of this Act, shall be and remain a corporation, under any name indicating their corporate character, assumed in their articles of association, and which is not previously in use by any other corporation or company.

SEC. 2. The purpose for and the place within which such corporation is established, shall be distinctly and definitely specified in the articles of association, and such corporation shall not direct its operations or appropriate its funds to any other purpose.

SEC. 3. The first meeting of such corporations hereafter organized, shall be called by notice, signed by one or more of the persons named in such agreement, stating the time, place and purpose of the meeting, a copy of which shall, seven days at least before the meeting, be given to each member, or published in some newspaper printed in the County where the corporation is to be located.

SEC. 4. If doubts arise whether any such corporation is legally organized, the stockholders, at a special meeting, called for the purpose, under their by-laws, or under the preceding section, may, by vote, confirm such organization and all proceedings under it; and by so doing, and depositing one copy of such vote with the Clerk of the Court of Com-

mon Pleas for the County where the corporation is located, and one with the Secretary of State, such corporation and the subsequent acts thereof shall be held legal and valid, as if the original organization had been legal.

SEC. 5. Every corporation so organized, and its officers and stockholders, may make by-laws not repugnant to the laws of the State, with penalty for the breach thereof not exceeding twenty dollars for each offence.

SEC. 6. The business of the company or corporation shall be managed and conducted by a President, or Board of Directors, a Clerk, Treasurer, and such other officers and agents and factors as the company authorizes for that purpose.

SEC. 7. The Directors, Clerk and Treasurer shall be chosen annually by the stockholders, and shall hold their offices until others are chosen and qualified in their stead. The manner of such choice, and the mode of the choice or appointment of all other agents, factors and officers of the company shall be prescribed by the by-laws.

SEC. 8. The number of the Directors shall not be less than three; one of them shall be chosen President by the Directors, or by the company, as the by-laws shall direct.

SEC. 9. The Clerk shall be sworn, and shall record all the votes of the company in a book to be kept for that purpose, and perform such other duties as shall be assigned to him. The Treasurer shall give bond in such sum, and with such sureties, as shall be required by the by-laws, for the faithful discharge of his duty.

SEC. 10. At all meetings of the company absent stockholders may vote by proxy, authorized in writing, but no proxy shall be valid unless executed and dated within six months previous to the meeting at which it is used, if the maker thereof resides in the United States; and no person shall as proxy or attorney, cast more than fifty votes, unless all the shares so represented by him are owned by one person; and no officer of the corporation, as proxy or attorney, shall cast more than twenty votes. Every company may determine by its by-laws what number of stockholders shall

attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting to constitute a quorum. If the quorum is not so determined a majority in interest of the stockholders shall constitute a quorum.

SEC. 11. The capital stock of every company, the amount whereof has been fixed and limited by such company according to law, shall remain so fixed, subject to be increased or reduced pursuant to the provisions of this Act.

SEC. 12. The amount of the capital stock of every company not organized shall be fixed and limited by the company, and shall, at its first meeting, be divided into shares, of which a record shall be made by the Clerk.

SEC. 13. The shares shall be numbered, and every stockholder shall have a certificate under the seal of the corporation, and signed by the Treasurer, certifying his property in such shares as are expressed in the certificate.

SEC. 14. The amount of capital stock of such corporation shall be fixed and limited in its articles of association. The corporation may increase or diminish its amount and the number of shares at any meeting of the stockholders specially called for the purpose; but the capital shall never be less than five thousand, nor more than five hundred thousand dollars, and no share shall be issued for less than its par value.

SEC. 15. Such corporation may in its corporate name, take, hold and convey such real and personal estate as is necessary for the purposes of its organization; may carry on its business, or so much thereof as is convenient beyond the limits of the State, and may there purchase and hold any real or personal estate necessary for conducting the same.

SEC. 16. Before such corporation commences business, the President, Treasurer, and a majority of the Directors, shall sign and swear to, publish three times in some newspaper printed in the Town or County wherein such corporation is situated, and deposit with the Secretary of State a certificate, setting forth the corporate name and purpose

of the association, the amount of the capital stock, the amount actually paid in, and the par value of the shares in the corporation, and shall file a copy thereof with the Clerk of the Court of Common Pleas, in the County wherein the corporation is situated, to be by him recorded in a book kept for the purpose. Within thirty days after the payment of any installment called for by the Directors, a certificate thereof shall be in like manner signed, sworn to, deposited, filed and recorded.

SEC. 17. When the capital stock and shares of any such corporation are increased or reduced, under the provisions of Section 14, a certificate thereof shall be made, signed, sworn to, deposited and recorded in the manner aforesaid.

SEC. 18. Shares may be transferred by the proprietor by an instrument in writing, under his hand, and recorded by the Clerk of the corporation in a book to be kept for that purpose. The purchaser named in such instrument so recorded, shall, on producing the same to the Treasurer, and delivering to him the former certificate, be entitled to a new certificate.

SEC. 19. Every company may, from time to time, at a legal meeting called for the purpose, assess upon each share such sums of money as the company think proper, not exceeding in the whole the amount at which each share was originally limited; and such sums assessed shall be paid to the Treasurer at such times and by such installments as the company directs. No note or obligation given by the stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock.

SEC. 20. If the proprietor of any share neglect to pay a sum duly assessed thereon, for the space of thirty days after the time appointed for payment, the Treasurer of the company may sell at public auctions, a sufficient number of his shares to pay all assessments then due from him, with the necessary incidental charges.

SEC. 21. The Treasurer shall give notice of the time and place appointed for such sale, and of the sum due on each share, by advertising the same three weeks successively be-

fore the sale, in some newspaper printed in the County where the corporation is established; and if there be no such paper, then in some newspaper printed in an adjoining County; and a deed of the shares so sold, made by the Treasurer, and acknowledged before a Justice of the Peace or Magistrate, and recorded as provided in Section 18, shall transfer said shares to the purchaser, who shall be entitled to a certificate therefor.

SEC. 22. The members of every company shall be jointly and severally liable for all debts and contracts made by the company until the whole amount of capital stock fixed and limited by the company in manner aforesaid, is paid in and a certificate thereof made and recorded as prescribed in the following section.

SEC. 23. The President and Directors, with the Treasurer and Clerk of such companies, shall after the payment of the last installment of the capital stock, make a certificate, stating the amount of the capital so fixed and paid in, which certificate shall be signed and sworn to by the President, Treasurer, Clerk, and a majority of the Directors, and they shall cause the same to be recorded in the Registry of Mesne Conveyance for the County wherein the corporation is established.

SEC. 24. If a company increases its capital stock as before provided in this Act, the officers mentioned in the preceding section, after payment of the last installment of such additional stock, shall make a certificate of the amount so added and paid in, sign and swear to the same, and cause it to be recorded in the manner therein provided.

SEC. 25. If any of the said officers refuse or neglect to perform the duties required of them in the two preceding sections, they shall be jointly and severally liable for all debts of the company contracted after the expiration of thirty days from the payment of the last installment, and before such certificate is so recorded.

SEC. 26. If a corporation diminish its capital stock as hereinbefore provided, a certified copy of the resolution or vote for that purpose shall be recorded in the Registry of

Mesne Conveyance for the County wherein the company are established; and in default thereof, the Directors of the company shall be jointly and severally liable for all debts of the company contracted after thirty days from such reduction, and before the recording of such copy.

SEC. 27. If any part of the capital stock of the company is withdrawn and refunded to the stockholders before the payment of all the debts of the company contracted previously to the recording of a copy of the vote for that purpose in the Registry of Mesne Conveyance, as prescribed in the preceding section, all stockholders of the company shall be jointly and severally liable for the payment of such debts.

SEC. 28. Every corporation organized under the provisions of this Act shall file the certificates required of corporations by Sections 23 and 24, and the Directors shall make, and the President, Treasurer and a majority of the Directors shall sign, swear to and deposit with the Clerk of the Court of Common Pleas for the County in which said corporation is established or located, within thirty days after the date of the annual or semi-annual meeting next preceding the date of such certificate, a certificate stating the date of such annual and semi-annual meeting, the amount of capital stock paid in, the name and number of shares held by such stockholders, the amount vested in real estate and in personal estate, the amounts of property owned by, and debts due to the corporation, and the amount, as nearly as can be ascertained, of existing demands against the corporation; all as ascertained and exhibited at the date of such an annual or semi-annual meeting.

SEC. 29. If the officers of any such corporation violate the provisions of Section 2, or neglect or refuse to perform the duties required by Sections 16, 17 and 28, they shall be jointly and severally liable for all debts of the corporation contracted during the continuance of such violation, refusal or neglect.

SEC. 30. When the officers of such corporation have failed to perform the duties prescribed in Sections 16, 17

and 28, the certificates therein mentioned may be made, filed and published at any time after such failure, and such officers shall not be personally liable for the debts of the corporation contracted after the requisitions of said sections have been complied with.

SEC. 31. If the Directors of any company formed under this Act declare and pay any dividend, when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company, then existing, and for all thereafter contracted, so long as they respectively continue in office: *Provided*, that the amount for which they shall all be so liable shall not exceed the amount of such dividend, and if any of the Directors are absent at the time of making the dividend, or object thereto, and file their objection in writing with the Clerk of the company, they shall be exempted from such liability.

SEC. 32. No loan of money shall be made by such company to stockholders therein, and if any such loan is made to a stockholder the officers who make it or assent thereto, shall be jointly and severally liable to the extent of such loan and interest, for all the debts of the company contracted before the re-payment of the sum so loaned.

SEC 33. The whole amount of the debts which any such company at any times owes, shall not exceed the amount of its capital stock actually paid in; and in case of any excess, the Directors under whose administration it occurs, shall be jointly and severally liable to the extent of such excess, for all the debts of the company then existing, and for all that are contracted, so long as they respectively continue in office, and until the debts are reduced to the amount of the capital stock; *Provided*, that any of the Directors, who are absent at the time of contracting any debt contrary to the foregoing provisions, or who object thereto, may exempt themselves from liability, by forthwith giving notice of the fact to the stockholders at the meeting they may call for that purpose.

SEC. 34. If any certificate made or public notice given

by the officers of a company, in pursuance of the provisions of this Act, is false in any material representation, all the officers who signed the same, knowing it to be false, shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

SEC. 35. When any of the officers of a company are liable, by the provisions of this Act, to pay the debts of the company, or any part thereof, any person to whom they are so liable may have an action against any one or more of said officers, and the declaration in such action shall state the claim against the company and the grounds on which the plaintiff expects to charge the defendants, personally; and such action may be brought, notwithstanding the pendency of an action against the company for the recovery of the same claim or demand; and both of the actions may be prosecuted until the plaintiff obtains the payment of his debt, and the cost of both actions.

SEC. 36. When the stockholders of such a company are liable by the provisions of this Act, to pay the debts of such company, or any part thereof, their property may be taken therefor, on an order of attachment, or on execution issued against the company for such debt, in the same manner as on orders of attachment and executions issued against them for their individual debts.

SEC. 37. An officer or stockholder of a company, who voluntarily or by compulsion pays a debt of the company, for which he is made liable by the provisions of this Act, may recover the amount so paid, in an action against the company, paid for its use, in which action the property of the company only shall be liable to be taken, and not the property of any stockholder.

SEC. 38. The Secretary of State shall annually prepare, cause to be printed, and on the fourth Tuesday of November submit to the General Assembly a true abstract from the certificates required by this Act to be deposited with him.

SEC. 39. The words "corporation" and "company" shall be construed as synonymous or interchangeable terms in this Act.

SEC. 40. Corporations organized for the purpose of manufacturing cotton or wollen goods, may, upon the consent of four-fifths of the stockholders, by vote, at a meeting called for that purpose, carry on the manufacture of silk, linen, wax, or india rubber goods.

SEC. 41. The Legislature may amend or repeal this Act so as to effect existing corporations, and may, by special Acts, annul or dissolve any such corporations.

SEC. 42. The Act entitled "An Act to authorize and regulate the creation of private corporations within this State," approved the twentieth day of December, A. D. 1866, is hereby repealed, in respect to all corporations hereafter to be formed; but its provisions shall remain of force as to all corporations which have already been organized under said Act; *Provided*, all corporations organized under said Act may re-organize under the provisions of this Act.

Approved December 10th, 1869.

CHAPTER XXXVIII.

OF CORPORATIONS ORGANIZED UNDER CHARTERS.

SEC.

General Provisions.

1361. Charters subject to amendment or repeal.

1362. Liability of stockholders in all corporations other than railroad corporations. Demand payable in one year. Action to be commenced whilst stockholder or within two years after ceasing to be one. Liability of persons holding a share or shares in any fiduciary capacity.

1363. Fraudulent misrepresentations as to capital, property, or resources, a misdemeanor. Penalty.

1364. Powers of such corporations.

1365. Shares to be deemed personal property.

1366. Capital not to be loaned to stockholders. Liability of Directors.

SEC.

1367. Debts not to exceed stock paid in. Directors liable; liability, how avoided.

1368. Capital stock not to be used in banking, etc.

1369. Common carriers not to discriminate on account of race, color, etc.

Manufacturing Companies.

1370. Subject to provisions of Sections 1361 to 1369, unless specified.

1371. Prerequisites to attachment of Acts of incorporation. Meeting of subscribers. Proceedings.

1372. Management. Choice of President and Directors.

1373. Directors to submit statements to stockholders. Penalty.

1374. Votes of stockholders.

1375. Other liabilities not removed.

General Provisions.

A. D. 1882.

Charters subject to amendment or repeal. 1841. XI, 168, § 41.

SECTION 1361. It shall be deemed a part of the charter of every corporation created under the provisions of any general law, and of every charter granted, renewed, or amended, by Act or Joint Resolution of the General Assembly (unless such Act or Joint Resolution shall in express terms declare the contrary), that such charter, and every amendment or renewal thereof, shall always remain

A. D. 1882. subject to amendment, alteration, or repeal by the General Assembly.

Liability of stockholders in all corporations other than railroad corporations.

SEC. 1362. It shall constitute a part of the charter of every corporation, other than railroad corporations, already in existence under Act of Assembly of this State, either general or special, passed since the adoption of the present Constitution, or which may be at any time hereafter created under or by virtue of any Act of Assembly, either general or special, unless some other liability shall be or has been imposed on the stockholders thereof under such charter, in which case the liability shall be only such as is specified in such charters; that each stockholder in the said corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding ten per cent. of the par value of the share or shares held by him at the time of the demand of the creditor was created; *Provided*, That such demand shall have been payable within one year; *Provided, also*, That proceedings to hold such stockholder liable therefor shall be commenced whilst he remains a stockholder therein, or within two years after he shall have ceased to be such stockholder; *Provided, further*, That persons holding stock in such companies as executors, administrators, or by way of collateral security, shall not be personally subject to the liabilities of the stockholders under the foregoing provisions; but the person pledging such stock shall be liable as a stockholder, and the estates and funds in the hands of such executors or administrators shall be liable in their hands in like manner, and to the same extent as the deceased testator or intestate, or the ward or person interested in such trust fund would have been if they had, respectively, been living and competent to act and hold the stock in their own names.

Demand payable in one year.

Action to be commenced whilst stockholder or within two years after ceasing to be one

Liability of persons holding a share or shares in any fiduciary capacity.

1880. XVII, 284, Con., Art. XII, §5.

1881, XVII, 578.

1871. XIV, 461, §12.

A. D. 1882.

Fraudulent misrepresentations as to capital, property or resources a misdemeanor. Penalty. 1880. XVII, 453; Con., Art. XII, §5.

SEC. 1363. It shall constitute a part of the charter of every corporation already in existence under any Acts of Assembly of this State, either general or special, passed since the adoption of the present Constitution of this State, or which may at any time hereafter be created under or by virtue of any Act of Assembly, either general or special, unless some other provision for the prevention and punishment of fraudulent representations as to the capital, property and resources of such corporations shall have been inserted therein, in which case the provision in reference thereto shall be only such as is specified in such charters; that any Director or other officer or stockholder of the said corporation, who shall knowingly and wilfully make or cause to be made any fraudulent misrepresentation or misrepresentations as to either the capital, property and resources of the said corporation, shall be held guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two thousand dollars ($2,000) or imprisonment for not longer than two years, or both, at the discretion of the Court.

Powers of such corporations. 1847. XI, 460, §7.

SEC. 1364. Such corporations shall have power to purchase and hold such real estate as may be required for their purposes, or such as they may be obliged or may deem for their interests to take in the settlement of any debts due them, and they may dispose of the same; to sue and be sued in all Courts; to have and use a common seal; to elect in such manner as they may determine to be proper all necessary officers, and to fix their duties; to make by-laws and regulations consistent with the Constitution and laws of this State for their own government and the due and orderly conduct of their affairs, and the management of their property.

Shares to be deemed personal property. Ib., §10.

SEC. 1365. The shares in the capital stock of such corporations shall be deemed personal estate; and the mode of issuing the evidence of stock, and

A. D. 1882.

the manner, terms and conditions of assigning and transferring shares shall be prescribed by the by-laws of each corporation.

Capital not to be loaned to stockholders. Liability of Directors. Ib., 211.

SEC. 1366. No note, bond or obligation given by any stockholder, whether secured by a pledge of the stock in such corporation, or in any other manner, shall be considered as payment of any part of the capital stock; and no part of the capital stock of such companies shall at any time, or upon any pretence whatever, be loaned to the stockholders, neither shall the capital be withdrawn or divided among the stockholders until all the liabilities of the company are lawfully paid, and no dividends shall be declared except from the net earnings of the company.

The Directors consenting to such withdrawal or division of the capital before the debts are paid, or to dividends out of the capital stock, shall be liable personally for the debts of the company, to any amount equal to the portion of capital which has been withdrawn or divided, or the dividend declared out of the capital stock.

Debts not to exceed stock paid in. Directors liable; liability how avoided. Ib., §5.

SEC. 1367. The total amount of debts which such corporations shall at any time owe, shall not exceed the amount of its capital stock actually paid in, and, in case of excess, the Directors in whose administration it shall happen shall be personally liable for the same, both to the contractor or contractors and to the corporation. Such of the Directors as may have been absent when the said excess was contracted or created, or who may have voted against such contract or agreement, and caused his vote to be recorded in the minutes of the board, may respectively prevent such liability from attaching to themselves by forthwith giving notice of the fact to a general meeting of the stockholders, which they are authorized to call for that purpose. The provisions of this section shall not apply to debts of railroad corporations secured by mortgage.

Capital stock not to be used in banking, etc.
1847. XI, §6.

SEC. 1368. No part of the capital stock or any of the funds of such corporation shall, at any time during the continuance of their charter, be used or employed, directly or indirectly, in banking operations, or for any purpose whatsoever inconsistent with the provisions of their respective charters.

Common carriers not to discriminate on account of race, color, etc.
1869. XIV, 296, §§ 1, 3.

SEC. 1369. It shall not be lawful for any party or parties engaged in any business, calling or pursuit, for the carrying on of which a license or charter is required by law, Municipal, State, Federal, or otherwise, to discriminate between persons on account of race, color, or previous condition, who shall make lawful application for the benefit of such business, calling or pursuit; and no Act of incorporation shall be conferred upon any organization, the rules and regulations of which contain features not compatible with the provisions of this section.

Manufacturing Companies.

Subject to provisions of Sections 1361 to 1369 unless specified.
1847. XI, 459, §§1, 2.

SEC. 1370. All manufacturing companies which shall be incorporated in this State shall have all the powers and privileges, and be subject to all the duties, liabilities, and other provisions contained in Sections 1361 to 1369 inclusive of this Chapter, unless the said corporations be specially exempted therefrom by their respective charters.

Prerequisites to attachment of Acts of incorporation.
Meeting of subscribers.
Proceeding.
Ib., §2.

SEC. 1371. Subscriptions to the capital stock of such companies shall be made at such time and in such proportions as the parties applying therefor may determine. As soon as the number of shares requisite to make up the proposed capital of the company shall have been subscribed, the Act of incorporation shall attach and become effectual, and the corporation shall proceed to complete its organization. To this end a convenient time and place shall be appointed for the meeting of the subscribers, upon reasonable notice either in writing or by public

A. D. 1882.

advertisement in some newspaper in the County where such corporation is to be located. At this meeting the subscribers may proceed to elect such Directors and officers as they may deem necessary for completing the organization of the company.

Management. Choice of President and Directors.

1871. XIV, 461, §8.

SEC. 1372. The business of every corporation shall be managed and conducted by the President and Directors thereof, and such other officers, agents, and factors, as each company may think proper to authorize. The Directors shall be chosen annually, at such time and place as shall be provided by the by-laws of the company, and shall hold their offices for one year, and until others are chosen in their stead; and one of the Directors shall be chosen President, either by the company or by the Directors, as the by-laws may appoint.

Directors to submit statements to stockholders. Penalty.

Ib., §9.

SEC. 1373. The Directors shall submit to the stockholders annually, a written statement, under oath or affirmation of the Treasurer and President of the corporation, setting forth the amount of the capital stock paid in, and general assets of the company, and also the amount of existing debts; and if any board of Directors shall fail to make such statement, the said Directors shall be personally liable for all debts of the company then existing, and for all that shall be contracted before such notice is given.

Votes of stockholders.

1847. XI. 462, §13.

SEC. 1374. At all meetings of the company, and at the election of officers, each stockholder shall have one vote for each share he may own or represent, and executors, administrators, guardians and trustees shall represent the shares in their hands, and a person pledging his stock shall, nevertheless, vote as a stockholder.

Other liabilities not removed.

Ib., §16.

SEC. 1375. Nothing contained in the foregoing sections shall be construed to remove such liabilities as, by law, such corporations, their officers and stockholders, are now subject to.

PART V.

OF THE GENERAL STATUTES AND THEIR EFFECT.

CHAPTER CXIX.

OF THE GENERAL STATUTES AND THEIR EFFECT.

SEC.		SEC.	
2737.	General Statutes.	2739.	Repealing Section.
2738.	Common law of England of force.	2740.	When to take effect.

A. D. 1882. General Statutes.

SECTION 2737. This Act shall be designated and known as the General Statutes, and shall not be enumerated as one of the Acts of the present year.

Common Law of England of force.

SEC. 2738. Every part of the Common law of England not altered by this Act, nor inconsistent with the Constitution of the State and the customs and laws thereof, is hereby continued in full force and virtue within this State in the same manner as before the passage of this Act.

Repealing Section.

SEC. 2739. All Acts and Parts of Acts, the provisions whereof are re-enacted in this Act or which are inconsistent with or repugnant to this Act, are hereby repealed.

When to take effect.

SEC. 2740. This Act shall go into effect on the first day of May, A. D. 1882. But when it shall be construed in connection with other Acts, it shall not effect any Act passed by the General Assembly at and after the session thereof begun and holden on the fourth Tuesday in November, A. D. 1881.

113-302

FILED
JAN 5 1885
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 902.

APPEAL FROM FOURTH CIRCUIT.

SOUTH CAROLINA DISTRICT.

ROY STONE, PLAINTIFF IN ERROR,

VS.

R. G. CHISOLM, L. D. MOWRY, A. CANALE, AND SAMUEL LORD, DEFENDANTS IN ERROR.

BRIEF OF ARGUMENT OF DEFENDANTS IN ERROR.

MITCHELL & SMITH,
Attorneys for Plaintiff.

THEODORE G. BARKER,
Attorney for Defendants.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL, STEAM PRINTERS,
NOS. 3 BROAD, AND 109 EAST BAY STS.
1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 902.

ROY STONE, PLAINTIFF IN ERROR,

vs.

R. G. CHISOLM, L. D. MOWRY, A. CANALE, AND SAMUEL LORD, DEFENDANTS.

This was a suit at law upon certain coupons detached from bonds issued by the Marine and River Phosphate Company, a corporation created under the Act of the State of South Carolina, approved the 10th December, 1869, and entitled "An Act to regulate the formation of Corporations." 1

The allegations of the complaint are, that on the 21st of March, 1883, the defendants were directors of the Company; that on that day the Company being already indebted to an amount "not less than $75,000," and the capital stock actually paid in, amounting to only $75,000, the Company issued to the plaintiff, with the assent of the defendants, sixty (60) bonds of five hundred dollars each. (Record, fol. 4.)

That these bonds were in addition to the debt already existing, and constituted an indebtedness in "excess of the capital stock" paid in. (R., fol. 5.) 2

The complaint charges that these facts rendered the defendants, "jointly and severally, liable under the laws of the State, for the payment of the bonds and coupons held by the plaintiff," and he therefore demands judgment for $1050, the amount of the coupons sued upon, with interest from their maturity. The defendants demurred on the ground that the plaintiff could not maintain an action at law against the defendants, but that his remedy was by a bill in equity on behalf of all the creditors. (R., fol. 15.) 3

Upon a division of opinion, the question certified to this Court for its determination is thus stated in the record (f. 47):

"Whether the liability imposed upon the directors of a corporation by the provisions of the Statutes referred to in the complaint, can be enforced by a single creditor in an action at law against one or more of the directors, or whether
4 such creditor must proceed by a creditor's bill in equity."

The plaintiff relies on the Act to regulate the formation of corporations, approved December 10th, 1869, and also on Chapter XXXVIII. of the General Statutes of 1882.

The sections of the Act of 1869, 14 Stat. at Large of S. C., 295, bearing upon the question before the Court, are the following:

Sec. 33 (as it read before it was amended and repealed, as hereinafter shown), was as follows: "The whole amount of the debts which any such Company at any time owes shall
5 not exceed the amount of its capital stock actually paid in, and in case of any excess, the directors, under whose administration it occurs, shall be jointly and severally liable to *the extent of such excess*, for all the debts of the Company then existing, and for all that are contracted, so long as they respectively continue in office, and until the debts are reduced to the amount of the capital stock."

Sec. 41. The Legislature may amend or repeal this Act so as to affect existing corporations, and may by special Acts annul or dissolve any such corporation.

6 Section 33 was amended by an Act approved March 9th, 1871, 14 Stat. S. C., 673, so as to read as follows: "The whole amount of the debts which any such company at any time owes shall not exceed *double the amount of its capital stock paid in*, and in case of any excess the directors under whose administration it occurs shall be jointly and severally liable to the *extent of such excess* for all the debts of the Company then existing, and for all that are contracted, so long as they respectively continue in office, and such action may be brought, notwithstanding the pending of an action
7 against the Company for the recovery of the same claim or demand; and both of the actions may be prosecuted until

the plaintiff obtains the payment of his debt and the costs of both actions."

The complaint alleges that the defendant Company was incorporated under the Act of 1869 (f. 38). It does not state whether the Company was organized before or after the passage of the amendatory Act of 1871, nor is it important to enquire, as the Legislature had expressly reserved the power to amend the Act of 1869, so as to affect existing corporations, as above. 8

The section thus amended, with the rest of the Act, was incorporated into the Revised Statutes of 1872, page 362.

The plaintiff also relies on Section 1367 of Chapter XXXVIII. This Chapter is thus entitled,

"OF CORPORATIONS ORGANIZED UNDER CHARTERS,"

and, we contend, has no application to this Company, which is a corporation organized, *without charter*, under a general law, as distinguished from a special Act of Incorporation, or "Charter," granted by the Legislature. 9

This distinction has been maintained, since 1868, throughout the legislation of the State of South Carolina.

The Constitution, adopted in 1868, Article XII., Title "Corporations," declares:

"Section 1. Corporations may be formed under general laws; but all such laws may, from time to time, be altered, or repealed."

Section 5. All general laws and special Acts passed pursuant to this section shall make provision therein for fixing the personal liability of stockholders under proper limitations, &c. 10

The Act of 1869, under which this corporation was formed, is a "general law." It is entitled:

"An Act to Regulate the Formation of Corporations." The process of formation involves no "charter," and is based upon certain proceedings being taken by the corporators and the filing and publishing of a certificate by the officers, "setting forth the corporate name and purpose of the association, the amount of capital stock, &c." 11

The "Revised Statutes" of 1872 repealed the Act of 1869, but re-enacted its provisions in Chapter LXIV., entitled:

"OF CORPORATIONS ORGANIZED UNDER GENERAL STATUTES."

The "Revised Statutes" of 1872 at the same time collected all the previous laws relating to corporations organ-
12 ized under special Acts and embodied them in a separate Chapter, viz: CHAPTER LXIII., entitled:

"OF CORPORATIONS ORGANIZED UNDER CHARTERS."

Between 1872 and 1882, the distinction was kept up by specific amendments of these separate and distinct "Chapters," and the distinction was perpetuated in the "General Statutes" of 1882, in like manner, viz: A Chapter embodying the law applicable to corporations organized under gen-
13 eral laws, and a separate chapter embodying the law applicable to corporations organized under "Charters," or Special Acts. Thus, the provisions of the Act of 1869, as re-enacted in the "Revised Statutes" of 1872, Chapter LXIV., entitled, "*Of corporations organized under General Statutes*," are (except as modified) carried forward and embodied in Chapter XXXIX. of "General Statutes of 1882, entitled: "Of corporations organized under General Statutes,

and

the provisions of Chapter LXIII. of the "Revised Statutes"
14 of 1872, entitled "Of Corporations organized under Charters," are carried forward and embodied in Chapter XXXVIII. of "General Statutes." of 1882, entitled "Of Corporations organized under Charters."

It is therefore clear that Section 1367 of Chapter XXXVIII of "General Statutes," which treats of "Corporations organized under charters," can not be applied to this Company, which is a corporation formed under the general law, or in the distinctive language of the Statute Book, "organized under General Statutes."

15 The force of this point, in the case here certified, is enhanced by the fact, that the provisions of Section 1367 of

Chapter XXXVIII., so misapplied to this Company, as we contend, are repugnant, in certain important particulars, to those of the A. A., 1869, both as to "the liability imposed upon the directors of a corporation," and as to the remedy by which such liability is to be enforced. This Court, therefore, in considering the question certified to it by the Judges of the Fourth Circuit, will be compelled to choose between two inconsistent statutory provisions fixing liability and 16
providing remedy, both of which are "referred to in the complaint"—the one being taken from the law of 1869, applicable to "Corporations organized under General Statutes," and the other from the law applicable to "Corporations organized under charters."

Another difficulty presents itself. We think it is clear that the provisions of the previous law applicable to corporations organized under "General Statutes," viz: The 33d section of the "Revised Statutes," and the 33d section of the Act of 1869, are no longer in force in South Carolina (as we 17
shall show). If this be so, then no liability was imposed on the directors of this Company by the provisions of either of "the Statutes referred to in the complaint," and this Court will find itself drawn by the terms of the certificate of division into the discussion of a liability and a remedy, neither of which exist in law, and the question submitted by the certificate of division as to the provisions of the Statutes (one of which has been repealed, and the other is inapplicable to this Company), will be found to be not a practical, but a merely abstract question. 18

Have the provisions of the Act of 1869, referred to in the complaint, been repealed?

The Act of 1869, as amended by Act of 1871, was expressly repealed by the "Revised Statutes" of 1872. Its provisions were re-enacted and embodied in chapter LXIV. of the "Revised Statutes" of 1872, entitled, "Of corporations organized under General Statutes," p. 356.

The provisions of section 33 of the Act of 1869, as amended by Act of 1871, is re-enacted as section 33 of the 64th chapter of the Revised Statutes of 1872. 19

In December, 1881, the "General Statutes" of South

Carolina were adopted. They went into effect 1st May, 1882.

Most of the sections of chapter LXIV. of the "Revised Statutes" of 1872 are retained and re-enacted in chapter XXXIX. of the "General Statutes" of 1882, entitled, "Of corporations organized under General Statutes" of 1882, *but*

Section 33 was conspicuously NOT *retained or re-enacted in*
20 *1882. Nor has it been since re-enacted by any amendment of the "General Statutes."*

Several of the sections of the LXIV. chapter of the "Revised Statutes" of 1872 imposed liability upon directors or officers of any company organized under General Statutes. Notably, sections 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, provided for such liabilities, and also certain remedies for enforcing the same. Of these, the Legislature, in 1882, did *not* re-enact sections 25 and 26, but re-enacted section 27; did *not* re-enact sections 28, 29 and 30, but re-enacted sec-
21 tion 31; did *not* re-enact sections 32 and 33, but did re-enact sections 34 and 35, clearly showing a closely discriminating selection of what provisions it intended to repeal, and what it purposed to retain, of the previous law affecting "corporations organized under General Statutes."

It is not deemed necessary to the decision of this case, nor is it necessary to the argument to cite at length the provisions of these sections, or to refer to them; except as follows: for the purpose of showing the change made in the application of section 35 of the Revised Statutes of 1872 (which was
22 re-enacted in the General Statutes of 1882, as section 1401 of chapter XXXIX.) to the subject matter of the sections which preceded it, and of showing that, although the provisions of section 35 of the law of 1872 and of 1869 were re-enacted in 1882, its juxtaposition and context was entirely changed, and so its application, by the repeal of section 33, to the liability, thus created, ceased.

The old law stood thus:

Section 29 made the officers jointly and severally liable for *violation of sections 16, 17 and 28.*

23 Section 31 made directors "jointly and severally liable for all debts then existing, and for all contracted so long as

they respectively continue in office, " if *they declare and pay any dividend when the Company is insolvent,* or the payment of which would render it insolvent."

Section 32 declared that if any *loan of money is made by a Company to its stockholders,* the officers who make it or assent thereto shall be jointly and severally liable to the extent of such loan and interest for all the debts of the Company, &c.

Section 33 (cited above) made the directors in whose ad- 24
ministration the *debts* of the Company *exceeded double the amount of the capital stock* actually paid in, jointly and severally liable to the extent of such excess for all debts of the Company then existing, &c.

Section 34 provided that if any certificate or public notice given by the officers of the Company is false, all the officers who signed the same shall be jointly and severally liable for all the debts of the Company, &c.

Then followed section 35 as follows:

" Section 35. When any of the officers of such a Company " 25
(i. e. Company organized under General Statutes) " are liable to pay the debts of the Company, or any part thereof, any person to whom they are so liable may have an action against any one or more of said officers, and the complaint in such action shall state the claim against the Company, and the grounds on which the plaintiff expects to charge the defendants personally, and such action, &c."

It will be seen that the words, " when any of the officers of such a Company are liable to pay the debts of the Company, &c.," under the old laws of 1869 and 1872 applied 26
to all the preceding sections imposing such liabilities, *including* that imposed by *section 33* on the directors for the excess of debt over double the amount of capital, &c., and it is equally clear that, after sections 33, 32, 30, and 29 were repealed, the language of section 35 (re-enacted in section 1401 in General Statutes of 1882) applied only to the liability provisions which were retained, viz: those of sections 34 and 31, re-enacted as sections 1400 and 1399 General Statutes; that is to say to the provisions of section 34, against false certificates, re-enacted as section 1400, and that 27
of section 31, against paying dividends when Company is insolvent, &c., re-enacted as section 1399.

Section 1401 will thus read:

"When any of the officers of the Company are liable to pay the debts of the Company (that is to say as provided in sections 1399 and 1400) or any part thereof, any person to whom they are so liable shall have," &c.

The "35th Section" of Act 1869, as it appears in the General Statutes of 1882, (chapter xxxix, Sec. 1401,) no
28 longer follows as in the Revised Statutes of 1872, and the Act of 1869, a Section containing the provision of Section 33, making directors liable "in case of excess" of debt over capital stock, "for all the debts of the Company then existing," but follows Sections providing for other and totally different liabilities, as we have shown above, thus making the words "when any of the officers of such corporation are liable to pay the debts of the Company," &c., in Section 1401, bear a totally different construction by the context of the law than the same words
29 bore in the 35th Section of the Revised Statutes, and of the Act of 1869 and therefore the 35th Section as re-enacted in Section 1401 of the General Statutes, if it were not otherwise, is thus rendered wholly inapplicable, for the directors are no longer made liable to pay the debts or any part thereof.

We are thus careful to note the result of the changes so made in 1882 in the law of "corporations organized under General Statutes," and of the change thus made in the reading and construction of section 35 of the old law (become section 1401 of the new law) because it has been loosely
30 argued that section 1401 of chapter XXXIX. of General Statutes of 1882 (relating to "corporations organized under General Statutes") may be resorted to in connection with the provisions of chapter XXXVIII. which relates, as we have seen, not to "corporations organized under General Statutes," but expressly and distinctly to "corporations organized under charters." To make such application of section 1401 would be to wrest the section wholly from the immediate juxta-position and context of the statute book, from the subject matter of a chapter which purports to
31 codify and embody all the statute law on the subject of "corporations organized under general laws," and to force it into

connection with the subject matter, and make it part of the context of another and different chapter, which purports to codify and embody, separately and distinctively, all the law relating to corporations of another and different kind, viz: "Corporations organized under charters."

"The General Statutes of 1882 are not simply a codification of Acts previously passed. They were passed by the Legislature, and approved by the Governor, in accordance with the requirements of the Constitution as to the enactment of laws, and have the force and effect of law then enacted." 32

McNamee vs Huckabee, 20 S. C., 201.

Section 2739 of this Act provides "that all Acts or parts of Acts, the provisions whereof are re-enacted in this Act, or which are inconsistent with or repugnant to this Act, are hereby repealed."

It is clear that this section repeals all the "laws of the State" referred to in paragraph X. of this complaint, and we contend, that it repeals the 33d section of the Act of 1869 and 1872, the provisions of that section being expressly and pointedly omitted, while other sections making directors liable in other respects, are retained and re-enacted as parts of the new law, which was then enacted as a whole, and intended to stand as a complete Code on the subject of "Corporations organized under General Statutes." 33

The General Statutes of 1882 were clearly intended as a substitute for the previous laws.

A subsequent Statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the former. 34

Bartlett *vs.* King, 12 Mass., 545.

"It is a rule of law that where a revising Statute, or one enacted *for another*, omits provisions contained in the original Act, the parts omitted can not be kept in force by construction, but are annulled." 35

Stewart *vs.* Kohn, 11 Wallace, 502.

"A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter Statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood, as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law, so far as
36 the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself, and repealed all other law on the subject embraced within it.

Murdock *vs.* Murphy, 20 Wallace, 617.

It *may* be said, on the other side, that the provisions of Chapter XXXIX. of General Statutes on the subject of "Corporations organized under General Statutes," was intended
37 to apply to future corporations organized thereunder, and not to existing corporations previously organized.

We do not admit that this is so, especially as to the sections of the Act which impose penalties, and we contend that, as to then existing corporations, no *statutory* liability in the nature of penalty which had been repealed, could thereafter be enforced against the directors or officers of any such corporations.

But even if this Court should not accept the argument in favor of the repealing effect of the legislation of 1882, and
38 should hold that it applies only to future corporations, then the like construction must hold as to the Section 1367 of Chapter XXXVIII. on "Corporations organized under Charters," which is relied on by the plaintiff below. The provisions of that chapter must, by the same rule, also be held to apply only to future corporations, and not to those then existing, and Section 1367 can not, as plaintiff contends, apply to this Company.

As to this Section 1367 of Chapter XXXVIII. of General Statutes, if it be held that the provisions of that chapter are
39 not restricted to "Corporations organized under Charters," as the title and all the provisions of the chapter and the

history of the legislation on the subject-matter seem to show, and that it may apply to this Company, which was organized under a different law, to wit, the general law for the formation of corporations, the Act of 1869, then it must be noted that there is a marked discrepancy between the provisions of Section 33 of the Acts of 1869 and 1872, and those of Section 1367 of Chapter 38 of "Revised Statutes," as to the liability of the directors, which discrepancy would have 40
to be reconciled by this Court before the two sections can be referred to as determining what is the actual liability of the defendants, under the Statutes of the State.

The Act of 1869, Section 33, as amended in 1871, declared that "The whole amount of the debts which any such Company at any time shall not exceed *double the amount of its capital stock paid in*, and in case of any excess the directors under whose administration it occurs shall be jointly and severally liable to the *extent of such excess* for all the debts of the Company then existing, and for all that are contracted, 41
so long as they respectively continue in office."

While Section 1367 of the General Statutes, Ch. XXXVIII. reads:

"Sec. 1367. The total amount of debts which such corporation shall at any time owe, shall not exceed *the amount* of the capital stock actually paid in, and in case of excess the directors in whose administration it shall happen shall be personally liable for the same, both to the contractor or contractors and to the corporation."

In the Acts of 1869 and 1872, the law is, "the whole 42
amount of the debts *shall not exceed double the amount of the capital stock paid in.*

In the 1367 Section of Ch. XXXVIII. of General Statutes, it is, "shall not exceed *the amount of the capital stock actually paid in.*"

In the former the directors are made liable "to the extent of such excess for all the debts." In the latter the directors are liable "for the excess."

In the one case the directors are made "jointly and severally liable," and in the other the directors (as a whole) are 43
made "personally liable." In the one Act it is not said to

whom they are liable, while in the other, the 1367 Sec., G. S., it is said they shall be liable, "both to the contractor or contractors and to the corporation," and the section subsequently speaks of "such contract or agreement."

NATURE OF THE LIABILITY.

44 But if the Court should hold that the law of corporations organized under general laws, as expressed in the 33d section of the Act of 1869, and the like section of the "Revised Statutes" of 1872 has not been repealed by the General Statutes of 1882, *or*, that the repeal of those provisions does not affect corporations existing at the date of the Act of 1882, or that chapter XXXVIII. "on corporations organized under charters" may apply to the Company which was organized under the general law, or that while chapter XXXIX. does not apply to existing corporations, chapter XXXVIII. does
45 apply to such corporations, and that section 1367, upon which plaintiff relies in his complaint, does embody the liability of the directors of this Company, in spite of the difference in the phraseology of the provisions of that section, and the phraseology of the provision of the 33d section of the Act of 1872 and of 1869, upon which he also relies, as declaring the liability of these defendants, then we contend that,

The nature of the liability created by all and any of these Acts has been definitely settled by the decisions of this and
46 other Courts.

In Horner vs. Henning, 93 U. S., 228, this Court in construing an Act of Congress, precisely like that now under consideration, said: "We are of opinion that the fair and reasonable construction of the Act is, that the trustees who assent to an increase of the indebtedness of the corporation, beyond its capital stock, are to be held guilty of a violation of their trust; that Congress intended, that, so far as this excess of indebtedness of capital stock was necessary, they should make good the debts of the creditors who had been
47 sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are en-

titled to share in it, in proportion to the amount of their debts."

Pollard vs. Bailey, 20 Wallace, 520, and cases following.

REMEDY.

In Horner vs. Henning the Court said: "Nor can we believe that an Act intended for the benefit of the creditors 48
generally, when the bank proves insolvent, can be justly construed in such a manner that any one creditor can appropriate the whole, or any part of this liability to his own benefit, to the possible exclusion of all or any part of the other creditors. But such may and probably would be the result, if any one creditor could sue alone, while there were others unsecured."

"The remedy for this violation of duty as trustees, is, in its nature, appropriate to a Court of Chancery. The powers and instrumentalities of that Court, enable it to ascertain 49
the excess of the indebtedness over the capital stock, the amount of this which each trustee has assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also the numbers and names of the creditors; the amount of their several debts, &c., &c., in a manner which a trial by jury and the rigid rules of common law proceedings render impossible."

In Anderson vs. Spears, 21 Hun., 568, the Supreme Court of New York follows the decision just cited, and points out the distinction between that case and the earlier New York 50
cases, in which it had been held "that one creditor could maintain an action in his own behalf for the recovery of the debt due to himself."

"The cases relied upon," said the Court, "have all arisen under other provisions of the same or other statutes which, by their terms, render the officers and stockholders jointly and severally liable for *all* the debts of the Company. The provisions of the statute on which this action depends does not render the trustees liable for all the debts of the corporation, but only to the extent of the excess of the indebted- 51
ness. The provisions are clearly distinguishable. One class

includes all the debts existing against the Company, while the other substantially creates a fund to the extent of the unlawful excess of the indebtedness in the distribution, of which all the creditors are ratably entitled to participate."

The clause of this South Carolina Act of 1869, which we have been considering, has not yet been construed by the Courts of South Carolina, but decisions have been made con-
52 struing other statutes, which leave no room to doubt that when the question does arise, the rule laid down in Horner vs. Henning and other cases will be followed.

In Terry vs. Calnan, 13 S. C., 220, construction was given
Terry v Calnan 4 S.C. 508. to the charter of a bank which provided that in case of the failure of the bank each stockholder should be liable for *any sum not exceeding the amount of his shares.*

The Court said: "It certainly could not have been intended that each creditor of the bank should have a separate action against each stockholder individually. The incon-
53 veniences of such a remedy is a reason for not subjecting the language of the charter to such a construction when any other construction can be found reasonably to effectuate its intent and satisfy its expressions. The language of the section quoted above contemplated liability in a single sum to be measured in the manner pointed out by the Act, and would therefore imply liability to a single action for the purpose of enforcing such demand."

In Sullivan vs. Sullivan Manufacturing Co., reported in 14 S. C., 494, and 20 S. C., 500, an action was brought upon
54 a note and upon an open account against a debtor corporation, and also against its directors, to make them liable for the debts of the company, under certain sections of the Act of 1869, which provided that the officers of the company under certain contingencies (alleged in the complaint to have happened) should be "*jointly and severally liable for all the debts of the company.*"

The defendants demurred upon the ground that several causes of action had been improperly united. This was the only point involved in the case, but in its opinion the Court
55 said: "It is true that the liability of the directors may not be coextensive in amount with that of the corporation. For

example, a failure to comply with the provisions of section 33 does not render the directors liable to pay the whole amount of the debts, but only makes them liable to the extent which such debts exceed double the amount of the capital stock paid in, but this constitutes no objection to their being joined in the same action with the corporation, inasmuch as there is no difficulty under the Code in entering separate judgments against several defendants. 56

It may be that no judgment should be rendered in the case in favor of the plaintiff until all the creditors of the corporation are called in, but there is no demurrer for defect of parties, and these questions are not now properly before us."

This can not, of course, be regarded as an authoritative declaration of the law upon the question involved in this case, but it nevertheless indicates the opinion of the Court that a creditor's bill is the proper mode of proceeding even under those sections of the Act which impose an *unlimited* 57 joint and several liability upon the directors for all the Company's debts.

It was claimed on the circuit that the right to maintain this action was expressly given to the plaintiff by the 35th Section, which is in these words:

" Whenever any of the officers of a Company are liable by the provisions of this Act to pay the debts of the Company, or any part thereof, any person to whom they are so liable may have an action against any one or more of said officers, and the declaration in such action shall state the claims 58 against the Company, and the grounds on which the plaintiff expects to charge the defendants personally, &c."

This point was determined adversely to the appellant's contention in Merchant's Bank *vs.* Stevenson, 10 Gray, 232. The words of the Massachusetts Statute construed in that case, which created the liability, were the same as those employed in the 33d Section of the Act of 1869 of South Carolina.

The Massachusetts Act also provided, " that when any of the officers shall be liable to pay the debts of such Company, or any part thereof, any person to whom they are so liable 59 may have an *action on the case* against any one or more of

said officers (§ 29), or may, instead of the proceedings mentioned in §§ 29 and 30, have his remedy against said officers by a bill in equity." (§ 31.)

The plaintiff brought an action on the case. The defendants demurred on the ground that the rights of the creditors and the liabilities of the defendants, the directors of the corporation, to them could not be determined at law, but only
60 by bill in Equity.

It was urged in that case, as it probably will be here, that, by "the express terms of the Act, any creditor whose debt had been contracted while the excess of indebtment continued, might have an action at law against the directors," but the demurrer was overruled. Shaw, C. J., said: "We are of opinion that an action at law under the circumstances of this case will not lie. The Statute says: 'That any person to whom they are so liable may have an action on the case against any one or more of said officers.' But taking this
61 section in connection with § 31 of the same chapter, authorthorizing a bill in Equity instead of such action at law, and with Ch. 81, § 8, giving this Court jurisdiction in Equity in all cases in which there are more than two persons having distinct rights and interests which can not be justly decided in one action at common law, we are of opinion that the plaintiff's remedy is in Equity. * * There are various parties here having several and unequal claims against a common fund, &c., &c."

Commenting on this case in Hornor *vs.* Henning, this
62 Court says: "While the case is considered in reference to remedies afforded by the Statute, it is placed on the solid ground, that the fund by this Statute, consists of the excess of all debts over the capital, and that there are various parties having equal and unequal claims against the fund, which exceed it in amount."

It will be observed that the South Carolina Act, while in other respects following the Massachusetts Act, does not contain the words "action on the case." There is no doubt, therefore, that the creditor had, under the law of South Car-
63 olina, the same election of remedies as was given to the creditor in express terms by the Massachusetts Act, and just as

little doubt that the South Carolina Courts of Equity, which have always exercised all the powers of the English Chancery Courts, had jurisdiction in cases in which several parties had several and unequal claims against a common fund which could not be justly determined in an action at law.

The case of *Merchant's Bank vs. Stevenson* must, therefore, be decisive of the case at bar, even if the Act of 1869 is to be regarded as still of force. 64

But that Act was expressly repealed by the "Revised Statutes" of 1872, which contains this provision, p. 768.

"The following entitled Acts passed in the several years hereinafter enumerated are hereby expressly repealed.

* * * * * *

1869. "An Act to regulate the formation of corporations."

* * * * * *

The provisions of the Act thus repealed were, however, 65 with certain changes and modifications re-enacted by being incorporated into the Revised Statutes of 1872, as Chapter LXIV., page 356.

Sec. 35 of the Act of 1869, in the "Revised Statutes" of 1872, reads as follows:

"Whenever any of the officers of such company are liable to pay the debts of the company or any part thereof, any person to whom they are so liable, may have an *action* against one or more of said officers, and the *complaint* in such action shall state the claim against the Company and 66 the grounds on which the plaintiff expects to charge the defendants personally, &c."

It will be observed that the word "complaint" is here substituted for "declaration," the word used in the original Act, and the use of which furnished the plaintiffs below the only ground for contending that an action at law was contemplated by the 35th section of the Act of 1869.

This change was doubtless made for the purpose of making the phraseology employed in section 35 conform to the changes made in the pleadings in civil actions by the following sections of the new Code of Procedure, which had been 67

adopted in South Carolina in 1870, and which also forms a part of the Revised Statutes of 1872.

The preamble of A. A. 1870, declares:

"WHEREAS, it is provided that the present form of actions and pleadings in cases at common law should be abolished; that the distinction between legal and equitable remedies should no longer continue; and that an uniform course of
68 proceeding in all cases should be established, therefore be it enacted—

SECTION 163, p. 604. All the forms of pleading heretofore existing are abolished.

SEC. 164. The first pleading on the part of the plaintiff is the complaint.

SEC. 2. An action is an ordinary proceeding in a Court of Justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

69

It is clear that an action in the nature of a bill of equity, brought by a single creditor on behalf of himself and all others, is now as much an "action" within the meaning of that word, as employed in the Revised Statutes, as is a proceeding at law. It can not be claimed with any plausibility that an action at law is the only mode of proceeding contemplated by section 35 of the Revised Statutes.

The precise question now under consideration was expressly ruled by this Court in Manufacturing Co. *vs.* Brad-
70 ley, 105 U. S., 178, when construing the identical clauses of the charter of this same Company which we have been considering.

In that case, a bill in Equity was filed against the Company for foreclosure of a mortgage. Certain of the stockholders were made parties defendant, who, it was alleged, were jointly and severally liable for all the debts of the Company, upon the ground that the whole capital stock had not been paid in.

The defendant stockholders objected, that the jurisdiction
71 in Equity could not be sustained, as the 35th and 36th Sections of the charter (Act of 1869) gave to the complainants a complete and adequate remedy at law.

The plea to the jurisdiction was overruled. The Court said: "The Statute under consideration prescribes no form of action, and the jurisdiction may be regarded as concurrent, both at law and in Equity, according to the nature of the relief made necessary by the circumstances upon which the right arises."

In case this Court shall reach the conclusion that the 33d Section of the LXIV. chapter of the Revised Statutes of 72
South Carolina of 1872, or the 33d Sec. of the A. A. 1869 are still of force and unrepealed, we contend

That it, by the clear intention of the Legislature, creates a fund to the extent of the unlawful excess of indebtedness for the benefit of all the creditors.

Who may enforce the liability?

The Act declares (*Section 35*) that "When any of the officers of such Company are liable to pay the debts of the Company, any person to whom they are so liable may have an action, &c." 73

We turn to Section 33 to find when any officers of such Company are liable, and we read "The whole amount of the debts which any such Company at any time owes, shall not exceed double the amount of its capital stock actually paid in; and *in case of any excess*, the directors, under *whose administration* it occurs, &c."

Clearly something was contemplated to be first ascertained in order to fix the time "when" the circumstances under which, or the "case" in which the officers were to be liable, before such persons could, under Sec. 35, "have an 74
action against such officers."

An action at law, as distinguished from a proceeding in Equity, or a trial by jury, could never be the proper or convenient means for ascertaining such liability, or for determining

(1). The amount of the capital stock actually paid in.

(2). For ascertaining the whole amount of the debts which such Company at any one time might owe.

(3). For determining that such debts were more than double the amount of such capital stock actually paid in. 75

(4). For deciding under whose administration as director,

such excess had occurred, and which of the directors assented thereto.

(5). For ascertaining who were the creditors to whom such director or directors were liable.

(6). The proportionate amount for which, equitably, each director should be liable, and

(7). The proportionate amount to which each creditor
76 should be entitled.

The Section prescribes no form of action, leaving that to be determined "by the nature of the relief made necessary by the circumstances under which the right arises."

In addition to the other facts upon which the plaintiff rests his right to recover against the directors, paragraph XI of the complaint (R., f. 45) alleges that the Company is totally insolvent—that its property is mortgaged beyond its value—that there is no unencumbered property subject to levy, and that judgment and execution against the Company
77 would be nugatory and fruitless.

If these allegations be correct, the case at bar is evidently one in which the rule laid down by this Court in *Horner vs. Henning*, should be rigidly enforced.

THEODORE G. BARKER,
Attorney for Defendants.

James Bowdy
Of counsel

GENERAL STATUTES OF 1882.

CHAPTER XXXVIII.

OF CORPORATIONS ORGANIZED UNDER CHARTERS.

[This Chapter is to be printed with Plaintiffs' Brief. See their letter]

CHAPTER XXXIX.

OF CORPORATIONS ORGANIZED UNDER GENERAL STATUTES.

SECTION 1376. "Charters for churches, cemeteries, fire, hook and ladder companies, Free Masons, Odd Fellows, charitable and religious institutions or societies, labor, agricultural, manufacturing, industrial, mining, or other like societies and companies, shall be granted by the Clerk of the Court of the County wherein the applicants therefor reside, or propose to carry on business or hold property." 1

[The rest of this section prescribes form of application, &c., &c., &c.]

SEC. 1377, prescribes form of charter for labor organizations, manufacturing, mining, or companies or associations of like nature.

SEC. 1378, prescribes form of charter for churches.

SEC. 1379, for charitable associations.

SEC. 1380, for hook and ladder companies. 2

SEC. 1381, for academies.

SEC. 1382, for jockey clubs, &c.

SEC. 1383, directs the Secretary of State to furnish blank charters to Clerks of Court.

SEC. 1384, directs Clerks of Court to make out charter, &c.

SEC. 1385, authorizes company to make by-laws.

"PROVISIONS APPLICABLE SOLELY TO CORPORATIONS UNDER CHAPTER I." (*Manufacturing, Mining, &c., &c.*)

SEC. 1386, directs Clerk to report granting of charter to Secretary of State. 3

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SEC. 1386, directs Clerk to report granting of charter to Secretary of State. 3

SEC. 1387, prescribes the officers of company.

SEC. 1388, directs annual election of directors.

SEC. 1389, prescribes number of directors.

SEC. 1390, permits absent stockholders to vote by proxy.

SEC. 1391, provides for increase or diminution of amount of capital stock.

SEC. 1392, directs shares to be numbered.

4 SEC. 1393, authorizes company to hold property out of the State.

SEC. 1394, provides for transfer of shares.

SEC. 1395, authorizes assessment on shares.

SEC. 1396, shares to be sold for unpaid assessments.

SEC. 1397, prescribes rules for the sale of shares under section 1396.

SEC. 1398. If any part of the capital stock of a company is withdrawn and refunded to the stockholders before the payment of all the debts of the company contracted pre-
5 viously to the recording of the copy of the vote for that purpose in the office of the Register of Mesne Conveyances, as prescribed in the preceding section, all stockholders in the company who have received any part thereof shall be jointly and severally liable for the payment of such debts.

SEC. 1399. If the directors of any such company declare and pay any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted so long
6 as they respectively continue in office, provided that the amount for which they shall be so liable shall not exceed the amount of such dividend; and if any of the directors are absent at the time of making the dividend, or object thereto, and file their objection in writing with the Treasurer of the company, they shall be exempted from such liability.

SEC. 1400. If any certificate made, or public notice given by the officers of such a company in pursuance of the provisions of this chapter, is false in any material representation, all the officers who signed the same, knowing it to be
7 false, shall be jointly and severally liable for all the debts of the company contracted while they were stockholders or officers thereof.

SEC. 1401. Whenever the officers of such a company are liable to pay the debts of the company, or any part thereof, any person to whom they are so liable may have an action against any one or more of said officers, and the complaint in such action shall state the claim against the company and the grounds on which the plaintiff expects to charge the defendants personally; and such action may be brought notwithstanding the pendency of an action against the company for the recovery of the same claim or demand; and both of the actions may be prosecuted until the plaintiff obtains the payment of his debt and the costs of both actions. 8

SEC. 1402. An officer or stockholder who voluntarily or by compulsion pays the debts of the company, for which he is made liable by the provisions of this chapter, may recover the amount so paid in an action against the company, in which action the property of the company only shall be liable to be taken—not the property of any stockholder.

SEC. 1403, authorizes the company to issue bonds. 9

SEC. 1404. Corporation and company synonymous.

ROY STONE *vs.* R. G. CHISOLM, ET AL.

DECEMBER 19, 1884.

Messrs. Mitchell & Smith:

DEAR SIRS: We have been delayed and embarrassed in preparing our Brief in above case by a total inability to 10 determine the scope of the words used in the certificate of division, "the provisions of the statutes referred to in the complaint."

The 10th section of the amended complaint specifies the 1367th section of the General Statutes of the State of South Carolina and the Act of Assembly approved 10th December, 1869, entitled "an Act to regulate the formation of corporations," and then goes on to say, "and by sundry other laws of said State."

Unless a specific reference is made by you to the "other 11 laws of said State," on which you intend to rely, we will

not be able to comply with the rule of the Supreme Court, which requires that when a statute of a State is cited, it must be printed at length.

The difficulty may possibly be overcome by your giving us a copy of your printed Brief, or so much thereof as sets out the statutes upon which you intend to rely; otherwise,
12 we see no other course for us to pursue than to apply to the Court for further time to print all the laws of the State which may possibly refer to the liability claimed, or to be relieved from the uncertainty of the complaint in some other way. Yours respectfully,

SIMONTON & BARKER.

ROY STONE *vs.* CHISOLM, ET AL.

13 DECEMBER 19, 1884.

Messrs Simonton & Barker:

GENTLEMEN: In answer to yours of this date, we beg to say that the statutes relied upon by us as imposing the liability claimed in the complaint on the defendants, are the Act to regulate the formation of corporations, approved December 10th, 1869, and chapter XXXVIII. of the General Statutes of 1882. We beg to state further that you will be saved from any delay for printing these statutes, as we will
14 print them ourselves. Yours,

MITCHELL & SMITH.